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THE  
LAW  
OF  
EVIDENCE.

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By a late Learned JUDGE.

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The SECOND EDITION, corrected; and  
many new REFERENCES added.

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With a Complete TABLE to the Whole.

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In the SAVOY:

Printed by CATHERINE LINTOT, Law-  
Printer to the King's most Excellent Ma-  
jesty, for W. OWEN, at *Homer's Head*,  
near *Temple Bar*. 1760.

X



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THE  
P R E F A C E.

**A**S the former Edition of this Work met with great Success from the Public, the Editor is encouraged to publish a Second, which has been carefully corrected throughout, with the Addition of many References to the best Authorities. The Reader is desired to take Notice that *Siderfin* is referred to as it was published, not according to the Time the Cases reported therein were taken, and of the following Abbreviations made use of in the Citations,

P R E F A C E.

Citations, viz. L. E. *Law of Evidence.* Hardw. *Reports of Cases in the Time of Hardwick, Chief Justice.* St. Tri. *State Trials.* Jones, *Sir William Jones*; 2 Jones, *Sir Thomas Jones, their Reports.* R. S. L. *Readings on the Statute Law.* H. H. P. C. *Hale's Historia Placitorum Coronæ.*



[ 1 ]

THE  
LAW  
OF  
EVIDENCE.

**T**HE first Thing to be treated of, is the Evidence that ought to be offer'd to the Jury, and by what Rules of Probability it ought to be weigh'd and consider'd.

In the first Place, it has been observed by a \* very learned Man, that there are several \* Mr. Locke Degrees from perfect Certainty and Demonstration, quite down to Improbability and Unlikeliness, even to the Confines of Impossibility; and there are several Acts of the Mind proportion'd to these Degrees of Evidence, which may be called the Degrees of Assent, from full Assurance and Confidence, quite down to Conjecture, Doubt, Distrust, and Disbelief.

B

Now



## *The Law of Evidence.*

Now what is to be done in all Trials of Right, is to range all Matters in the Scale of Probability, so as to lay most Weight where the Cause ought to preponderate, and thereby to make the most exact Discernment that can be, in Relation to the Right.

Now to come to the true Knowledge of the Nature of Probability, 'tis necessary to look a little higher, and see what Certainty is, and whence it arises.

ALL Certainty is a clear and distinct Perception, and all clear and distinct Perceptions depend upon a Man's own proper Senses; for this in the first Place is certain, and that which we cannot doubt of if we would, that one Perception or Idea is not another, that one Man is not another; that what belongs to one Man, does not belong to another; and when Perceptions are thus distinguish'd on the first View, it is called Self-Evidence, or Intuitive Knowledge.

THERE are some other Things whose Agreement or Difference is not known on the View, and then we compare them by the means of some third Matter, by which we come to measure their Agreement, Disagreement or Relation.

As if the Question be, whether certain Land be the Land of J. S. or J. N. and a Record be produced whereby the Land appears

pears to be transferred from *J. S.* to *J. N.* now when we shew any such third Preception, that doth necessarily infer the Relation in Question, this is call'd Knowledge by Demonstration. The way of Knowledge by necessary Inference is certainly the highest and clearest Knowledge that Mankind is capable of in his way of Reasoning, and therefore always to be sought when it may be had.

DEMONSTRATION is generally conversant about permanent Things, which being constantly obvious to our Senses, do afford to them a very clear and distinct Comparison; but transient Things that cannot always occur to our Senses are generally more obscure, because they have no constant Being, but must be retrieved by Memory and Recollection.

Now most of the Business of civil Life subsists on the Actions of Men that are transient Things, and therefore oftentimes are not capable of strict Demonstration, which, as I said, is founded on the View of our Senses, and therefore the Rights of Men must be determined by Probability.

Now as all Demonstration is founded on the View of a Man's own proper Senses, by a Gradation of clear and distinct Perceptions, so all Probability is founded upon obscure and indistinct Views, or upon Report from the Sight of others.

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Now this in the first Place, is very plain, that when we can't see or hear any Thing ourselves, and yet are obliged to make a Judgment of it, we must see and hear by Report from others; which is one Step farther from Demonstration, which is founded upon the View of our own Senses; and yet there is that Faith and Credit to be given to the Honesty and Integrity of credible and disinterested Witnesses, attesting any Fact under the Solemnities and Obligation of Religion, and the Dangers and Penalties of Perjury, that the Mind equally acquiesces therein as on a Knowledge by Demonstration, for it cannot have any more Reason to be doubted than if we ourselves had heard and seen it; and this is the Original of Trials, and all Manner of Evidence.

THE first therefore and most signal Rule, in Relation to Evidence, is this, That a Man must have the utmost Evidence, the Nature of the Fact is capable of: For the Design of the Law is to come to rigid Demonstration in Matters of Right, and there can be no Demonstration of a Fact without the best Evidence that the Nature of the Thing is capable of; less Evidence doth create but Opinion and Surmise, and does not leave a Man the entire Satisfaction, that

Per Holt.  
 6 Mod. 225,  
 248.  
 Ld. Raym. 154,  
 746, 1292,  
 1371.  
 2 Vern. 471, 591,  
 603.  
 Ch. Pre. 59, 64,  
 116.  
 10 Mod. 8.  
 Stra. 526, 1122.  
 See also Carth.  
 79, 80, 142,  
 181, 220, 225,  
 265, 346.  
 Skin. 15, 24,  
 32, 174, 205,  
 431, 579, 584, 623, 624, 639, 640, 672, 673. Salk. 285, 286, 287. 2 Salk.  
 690. 7 Mod. 129. Ld. Raym. 730, 734, 735, 1292. Stra. 162. See Bar-  
 hard, K. B. 243. L. E. 130. pl. 115.

arises



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arises from Demonstration; for if it be plainly seen in the Nature of the Transaction, that there is some more Evidence that doth not appear, the very not producing it is a Presumption, that it would have detected something more than appears already, and therefore the Mind does not acquiesce in any Thing lower than the utmost Evidence the Fact is capable of.

Now to understand the true Theory of Evidence, we must consider two Things.

FIRST, the several Sorts of Testimony.

SECONDLY, the Force of Testimony to prove the Matter which is alledg'd,

FIRST, of the several Sorts of Testimony, and that is again Twofold.

1. Written.
2. Unwritten.

IN the first Place, we are to consider, which of these two Sorts of Evidence, is to be preferr'd in the Scale of Probability, when they stand in Opposition to each other.

CICERO in his declaiming for *Archias* the Poet, gives a handsome Turn in Favour of the unwritten Evidence, pleading there for the Freedom of the Poet, when the Tables of the Enfranchisement were lost; and it is to this Sense,



See Vol. II. of  
Gutherie's Tran.  
of Tully's Orat.  
p. 136.

"We have here the plain Testimony of a  
Man of Integrity and Honour, which can  
never be corrupted or changed, and can we  
be prejudiced in the want of the Tables that  
are confess'd to be subject to much Corrup-  
tion and Alteration?" But the Ballance of  
Probability is certainly on the other Side,  
for the Testimony of an honest Man, how-  
ever fortified with the Solemnities of an  
Oath, is yet liable to the Imperfections of  
Memory, and as the Remembrance of Things  
fail and go off, Men are apt to entertain  
Opinions in their Stead, and therefore the  
Argument turns the other Way, in most  
Cases; for the Contracts reduced to Wri-  
ting, are the most sedate and deliberate Acts  
of the Mind, and are more advantageously  
secured from all Corruption, by the Forms  
and Solemnities of the Law, than they pos-  
sibly could have been, if they were retain'd  
in Memory only; from hence therefore, we  
shall begin with the written Evidence, that  
has the first Place in the Discourses of Pro-  
bability.

#### Written EVIDENCE.

Written Evidence is again Twofold, viz.

1. PUBLICK.
2. PRIVATE, between Party and Party.

FIRST Publick, and that is also Twofold,

1. RE-

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### 1. RECORDS,

### 2. MATTERS of inferior Nature.

AND first of Records: These are the Memorials of the Legislature, and of the King's Courts of Justice, and are authentick beyond all Manner of Contradiction: They are (if a Man may be permitted a Simile from another Science) the proper Diagrams for the Demonstration of Right, and they do constantly preserve the Memory of the Matter that it is ever permanent and obvious to the View, and to be seen at any Time in all the Certainty of Demonstration, in as much as the Record, as is observed elsewhere, can never be proved \* *per notiora*, for Demonstration is only appealing to a Man's own Conceptions, which can never be done with more Conviction than where you draw the Consequence, from what is already § *concessum*, and consequently, there can be no greater Demonstration in a Court of Justice, than to appeal to its own Transactions.

BUT Records being the Precedents of the Demonstrations of Justice, to which every Man has a common Right to have Recourse, cannot be transferred from Place to Place, to serve a private Purpose; and therefore they have a common Repository from whence they ought not to be removed, but by the Authority of some other Court, and this is in the Treasury of *Westminster*; and this

\* *More notorius.*

§ *Granted.*

Piece of Law is plainly agreeable to all Manner of Reason and Justice: For if one Man might demand a Record to serve his own Occasions, by the same Reason any other Person might demand it, but both could not possibly possess it at the same Time in different Places, and therefore it must be kept in one certain Place in common for them both; besides these Records, by being daily removed, would be in great Danger of being lost, and consequently it is on all Hands convenient that these Monuments of Justice should be fixed in a certain Place, and that they should not be transferred from thence, but by publick Authority from superior Justice.

10 Co. 92, 93.  
Ch. Rep. 15.  
Co. Lit. 225. a. b.  
226. a. 227. b.  
Cro. Car. 209,  
441, 442.  
Cro. Jac. 70,  
103, 109, 292,  
317, 360.  
Bulst. 154, 155.  
Pl. Com. 80. a.  
85. a. 148. b.  
222. a.  
Dy. 29. pl. 199.  
200. a.  
5 Co. 75. a.  
Palm. 87.  
Rol. Rep. 332.  
2 Rol. Rep. 172,  
191.  
Mod. Rep. 266. Doct. Pla. 215. Saund. 9, 10. Mod. 3, 42, 43, 74, 108, 109,  
126, 292, 507, &c. 515, &c. 518. 12 Mod. 3, 24, 394, 414, 494, 500, 579.  
8 Mod. 75, 322. 9 Mod. 66. 2 Vern. 471, 591, 603. Ch. Pre. 116. Eq. Abr.  
228. Ld. Raym. 153, 154, 746. 2 Ld. Raym. 763, 967, 1126, 1536. Stra. 401,  
526. 2 Stra. 1122, 1186, 1198, 1241. Tri. per Pais 3d. Edit. 166, 228. State  
Trials 44. Langhorn's Trial, 3 Lev. 387, 388. 8 Geo. c. 25. sect. 2. L. E.  
82. pl. 5.

THE Copies of Records must be allowed in Evidence, for since you cannot have the Original, the best Evidence that can be had of them is a true Copy; and the Rule of Evidence commands no farther than to produce the best that the Nature of the Thing is capable of; for to tie Men up to the Original that is fixed to a Place, and cannot be had, is totally to discard their Evidence; but it were very hard and injurious, to remove from Evidence the best and most authentic Testimony, because it is so guarded

and



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and confined by the Law, that it cannot be had or produced itself: For then the Rules of Law and Right would be the Authors of Injury, which is the highest Absurdity: For in many Cases, Justice must fail without Proof from the Records, when themselves cannot be had at the Trial.

BUT a Copy of a Copy, is no Evidence, <sup>2 Bac. Abr. 308, Skin. 174, 584.</sup> for the Rule demands the best Evidence, that the Nature of the Thing admits, and a Copy of a Copy can't be the best Evidence, for the farther off a Thing lies from the first Original Truth, so much the weaker must the Evidence be, and therefore they must give a true Copy in Evidence, which is to reduce it to its first and best Certainty: Besides, where you will give the Copy of a Copy in Evidence, there must be a Chasm or Gap in your Evidence; for if you have the first Copy, and by Oath or otherwise prove that a true Copy, then the second Copy is altogether idle and insignificant: If you have only the second Copy, then it cannot appear that the first was a true Copy, because it is not there to be sworn to, and by consequence it is not proved in Court, and there it is no Evidence, and consequently the Transcript of that which is in itself not Evidence, cannot be Evidence\*.

HENCE it is, that in an Ejectment upon an Elegit, you must prove not only the

<sup>Kent. Trin. Ass. 1709. per Tracy, Wilson and Wicherly.</sup>

\* By Stat. 20 Geo. 2. c. 24. sect. 14. Copies of Letters of Attorney, &c. relating to Prize Money, &c. made Evidence. <sup>L. E. 263. Tri. per Pais 191.</sup>

Judg-



Judgment, and by the Judgment Roll that the *Elegit* issued, and was returned, but you must prove the Writ of *Elegit* by a true Copy thereof, and the Inquisition thereon, because the Notice of the Judgment Roll, is no more than that the Party did elect such Execution to issue, and it is the *Elegit* and Inquisition upon it, that carves out the Term, and gives the Title of Entry, so that the Judgment Roll is no more than a Memorandum, that it was issued and returned, and the Copy thereof is no Evidence, being but a Copy of that, which is but a Copy or Memorandum of the Thing itself. *Sed Quære*, because *Holt* was then of a different Opinion, and was for allowing the Entry of the Roll to be good Evidence, that the *Elegit* had issued; for a Notice on the Roll of the Being and Return of the *Elegit*, is as good Evidence, that such *Elegit* was, as a Copy thereof.

THE first Sort of Records, are Acts of Parliament, these are the Memorials of the Legislature, and therefore are the highest and most absolute Proof: And they either relate to the Kingdom in general, and then are called General Acts of Parliament, or only to the Concerns of private Persons, and are thence called private Acts.

2 Salk. 566.

10 Mod. 216,

126, 181.

Keb. 2.

Jenk. Cent. 280. pl. 5.

Hale's Hist. of the Com. Law, 15, 16. Styl. 462.

L. E. 89. Tri. per Pais 226, 232. Stra. 446. 3 R. S. L. 90.

printed

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II

printed Statutes are the perfect and authentic Copies of the Records themselves, for there is no absolute Assurance of their Exactness, but every Person is supposed to apprehend and know the Law which he is bound to observe, and therefore the printed Statutes are allowed to be Evidence, because they are the Hints to that which are supposed to be lodged in every Man's Mind already.

A saving Proviso may be given in Evidence on the general Issue, because if the Party be within the Proviso, he is not guilty on the Body of the Act, on which the Action is founded, and consequently, if the Defendant shews he is within the Proviso, he is not guilty \* *Contra formam Statuti*.

Jon. 320.  
2 Rol. Abr. 683.  
pl. 15.

## S T A T U T E S.

If an Action or Information be brought on a penal Statute, and there is another Statute that discharges or exempts the Defendant from the Penalty, this ought to be pleaded, and cannot be given in Evidence on the General Issue; for the General Issue is but a Denial of the Plaintiff's Declaration, and the Plaintiff has proved him guilty when he hath proved him within the Law, upon which he hath founded his Declaration, so that the Plaintiff hath perform'd what he hath undertaken; but if the Defendant would exempt himself from the Charge of the Plain-

\* *Against the Form of the Statute.*

tiff,

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tiff, he should not have denied the Declaration, but have shew'd the Law which discharges him.

2 Rol. Abr. 683. ANOTHER Difference is taken between where the saving Proviso is Matter of Fact, and where 'tis a Point of Law: For when 'tis meer Matter of Fact, it may be given in Evidence, for the Reason formerly given; as if an Action of Debt be brought against a Spiritual Person for taking a Farm, the Defendant pleads \* *Quod non habuit nec tenuit ad Firmam contra formam Statuti*. Upon this Issue join'd, the Defendant may give in Evidence, that it was for the Maintenance of his House, according to the Proviso of the Statute, for this is not against the Statute.

Ibid.

UPON an Information on the 5 E. 6. c. 14. against Ingrossing, the Defendant on the general Issue, cannot give in Evidence a Licence of three Justices of Peace according to the Proviso in the Statute, because whether there be a sufficient Authority given is a Point of Law, and therefore ought to be pleaded, and cannot be given in Evidence without pleading it.

IN private Acts of Parliament the printed Statute Book is not Evidence, tho' reduced into the same Volume with the general Statutes, but the Party ought to have a Copy compared with the Parliament Roll; For Private Statutes do not concern the Kingdom

\* That he was not possessed of, or held the Farm against the Form of the Statute.



in general, and therefore no Man is understood to be possess'd of them, as they are of those general Laws which are set up as the Regulation of their own Actions, and consequently the Private Statutes are no Intimation to what is already known, but they are the Rules and Degrees that relate to the Private Fortune of this or that particular Man, which no one else is under any Obligation to understand or take Notice of, and therefore they ought to be proved with the same Punctuality as the Copies of all other Records, for they are not considered as already lodged in the Minds of the People.

*Quære*; For it seems the better Opinion that the Copy of Private Acts allowed to be Evidence, ought to be under the Great Seal.

10 Mod. 126.  
Dy. 239.  
3 R. S. L. 91.

BUT my Lord Chief Justice *Parker* allowed the printed Statute to be Evidence, in the Case of the College of Physicians and Doctor *West*, of the Truth of a Private Act of Parliament touching the Institutions of the College of Physicians because the printed Statute Book is printed by the Queen's Authority, and therefore tho' it be not so good Evidence of a Copy as an Exemplification under Seal, yet it must be supposed as good an Evidence of the Truth of the Copy as a Copy compared with the Rolls and sworn by the Testimony of any Witness, which is allowed daily as a good Proof of the Copy of a Record: For a Copy printed by publick Authority derives more Credit from that Authority

10 Mod. 353.  
But this Matter  
of Evidence does  
not appear there.  
Ld. Raym. 472.



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thority than it would from the Testimony of any living Witness that had compared it.

THE next Thing is the Copies of all other Records, and they are Twofold.

Under Seal,

and

Not under Seal.

10 Mod. 125,  
126.

FIRST under Seal, and these are call'd by a particular Name Exemplifications, and are of better Credit than any sworn Copy: For the Courts of Justice that put their Seals to the Copy, are supposed more capable to examine, and more exact and critical in their Examinations, than any other Person is or can be, and besides there is more Credit to be given to their Seal, than to the Testimony of any private Person; and therefore we are more sure of a fair and perfect Copy when it comes attested under their Seals, than if it were a Copy sworn to by any private Person whatsoever.

Exemplifications are Twofold.

Under the Broad Seal,

or

Under the Seal of the Court.

Sid. 145, 146.

Hard. 118.

Pl. Com. 411. a.

UNDER the Broad Seal; such Exemplifications are of themselves Records of the greatest Validity, and to which the Jury ought to give

give Credit, under the Penalty of an Attaint; for there is more Faith due to the most solemn Attestations of Publick Authority than any other Transactions whatever; and therefore a Falsification in this Case is High Treason.

WHEN a Record is exemplified under the Great Seal, it must either be a Record of the Court of *Chancery*, or be sent for into the *Chancery* by a *Certiorari*, which is the Center of all the Courts, and from thence the Subjects receive a Copy under the Attestation of the Great Seal: For in the first Distribution of the Courts, the *Chancery* held the Broad Seal, from whence the Authority issued to all Proceedings, and those Proceedings can't be copied under the Great Seal, unless they come into the Court where that Seal is lodged. 3 Inst. 173.

BUT if Exemplifications under the Broad Seal are the highest Evidence that the Nature of the Thing is capable of, then why are any Proofs admitted but them, since the chief Rule in Relation to Evidence demands the highest Evidence the Nature of the Thing is capable of? Objection.

WHEN we say the Law requires the highest Evidence that the Nature of the Thing is capable of, 'tis not to be understood, that in every Matter there must be all that Force and Attestation that by any Possibility might have been gathered to prove it, and that nothing under the highest Assurance possible should have been given in Evidence to prove any Answer.

any Matter in Question: To strain the Rule to that Height, would be to create an endless Charge and Perplexity, for there are almost infinite Degrees of Probability, one under the other, and if nothing but Matters of the highest Assurance might be given in Evidence, the Way of Illustration of Right would be the most troublesome and expensive that can be imagined; as for Instance, no verbal Contract could be proved, because a written Contract carries with it greater Credibility, and consequently the unwritten Contract would not be the greatest Assurance that the Nature of the Thing is capable of; so a Contract attested by two Witnesses gains more Credit than a Contract attested but by one; and therefore by the same Argument, one Witness would be no good Proof of a Contract; and all these are plainly as good Reasonings, as to say that the sworn Copy of a Record ought not to be admitted, because a Copy under the Broad Seal is a stronger Evidence.

BUT the true Meaning of the Rule of Law that requires the greatest Evidence that the Nature of the Thing is capable of, is this: That no such Evidence shall be brought which \* *ex natura rei* supposes still a greater Evidence behind in the Parties own Possession and Power, for such Evidence is altogether insufficient and proves nothing, for it carries a Presumption with it contrary to the Intent for which it was produced: For if the other greater Evidence did not make

• *From the Nature of the Thing.*

against



against the Party, why did he not produce it to the Court; as if a Man offers a Copy of a Deed or Will where he ought to produce the Original, this carries a Presumption with it that there is something more in the Deed or Will that makes against the Party, or else he would have produced it; and therefore the Proof of a Copy in this Case, is not Evidence, and cannot possibly weigh any Thing in a Court of Justice.

WHEN any Record is exemplified, the whole Record must be exemplified, for the Construction must be taken from the View of the whole Matter taken together.

3 Inst. 173.  
Post. 23, 27.

THE second Sort of Copies under Seal, are the Exemplifications under the Seal of the Court, and these are of higher Credit than a sworn Copy, for the Reasons formerly given.

THESE Exemplifications, and all other under Seal, shall be delivered to the Jury to be carried off with them, but sworn Copies shall not, for we have shewn the Original in the Court of *Chancery*, that the Invention of sealing was first advanced instead of Coins themselves, and that from thence it began to be made use of by Way of Attestation; and from the Example of the King it began to be used in all the Courts of Justice for the Attestation of their Transactions, and from the same Example it began to be used by private Lords of Manors for

Sid. 145.  
Hard. 118.  
Pl. Com. 411. 2.

the Authenticating of their Grants, and for Tickets instead of Pieces of Money; and from hence Impressions were devised with the Distinction of Arms and of Families, and these were perfectly known in the Neighbourhood, and therefore are always delivered to the View of the Jury, and the Jury are allowed to carry them away with them as the Acts of the most remarkable Solemnity, that the most solemn Acts may make the last Impression.

ANOTHER Reason why Matters under Seal shall be delivered to the Jury is, because these Things that are generally of higher or at least of equal Credit with Matters sworn \**Viva Voce*, would not yet be understood so well upon the Hearing, as the Evidence \**Viva Voce* may upon the Examination, where the Jury have the Liberty to put what Question they please; and therefore Matters under Seal are carried away by the Jury, to be seen and considered, that Things of greater Credit may be equally understood with other Matters that carry less Authority.

SH. 145.

BUT the Chirograph of a Fine, a sworn Copy or any other Writing, tho' it may be given in Evidence, yet it shall not be delivered to the Jury, for these have no intrinsic Credit in themselves, and the Jury of themselves are not supposed to take Notice of them, but they have no Credit but what they derive from something else, viz. from

\* *By Word of Mouth.*

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the Oath of the Person who attests them, or from some Presumption in their Favour, so that they receive their Credit from some Act in Court, but do not carry it along with them, and therefore cannot be removed out of Court with the Jury: But things under Seal are supposed to have an intrinsick Credit from the Impression of the Signature, and are supposed to be known to the Jury in some Measure, and therefore are very conveniently lodged in their Possession to discern of them; But of Writings that are not under Seal, the Jury can make no Discernment of their own, but their Credit must totally arise from some Act in Court, and therefore they cannot be put in the Power of the Jury.

### *Seals Publick and Private.*

BUT here the Distinction is to be made between Seals of Publick and Seals of Private Credit, for Seals of Publick Credit are full Evidence in themselves without any Oath made, but Seals of Private Credit are no Evidence, but by an Oath concurring to their Credibility: Seals of Publick Credit are the Seals of the King, and of his Publick Courts of Justice, Time out of Mind; now these Courts make a Part of the Law and the Constitution of the Kingdom, and have their Sanction in that immemorial Usage, that is the Foundation of the Common Law; now the Seals of these Courts are Part of the Constitution of the Courts themselves, and by Consequence the Courts and the Seals of

Sid. 146.

Hard. 118, 119;

Pl. Com. 411. 24



these Courts are supposed to be known to every Body, since they are equally intitled to that Supposal, as any other Custom or Law whatsoever.

Sid. 146.

So the Seal of a Court created by Act of Parliament, is of full Credit without further Attestation, for the Act of Parliament is of the same Notoriety with the Common Law, and therefore the Court, and the Seals thereby created, are supposed universally known to every Body.

Quere.

BUT the Seals of private Courts or of private Persons are not full Evidence by themselves without an Oath concurring to their Credibility, for 'tis not possible to suppose these Seals to be universally known, and consequently they ought to be attested by something else, *i. e.* by the Oath of some one who has Knowledge of them: For what is not of itself known, must be made known \* *Aliunde*, and when these Seals are thus attested, they ought to be delivered in to the Jury, because tho' Part of their Credit arises from the Oath that gives an Account of their Sealing, yet another Part of their Credit arises from a Distinction of their own Impression; for (as I said) antiently every Family had its own proper Seal, as it is now in Corporations; and by this they distinguish their Manner of contracting one from the other, and by false Impressions of the Seals they discovered a Counterfeit Contract, and therefore 'twas not the Oath but the Impression of the Seal ac-

\* *Otherways.*

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companying it, that made up the compleat Credit of the Instrument.

### Copies Sworn, and Office Copies.

BUT since in all private Contracts the Distinction of Sealing is worn out of Use, and Men usually Seal with any Impression that comes to Hand, to be sure there must be Evidence of putting the Seal, because at this Day little can be discovered from the bare Impression; besides, since the Witnesses Names are inserted in the Contract, unless they appear to prove the Contract, there is not the uttermost Evidence that the Nature of the Thing is capable of, for their not appearing is a Presumption that they were never privy to any such Transaction. But of this hereafter.

EXEMPLIFICATIONS of Depositions in Equity, shall be delivered to the Jury, if the Party be dead; and these Exemplifications are under the Great Seal; but if the Exemplification comprehends the Testimony of some that are living, and of others that are dead, it shall not be delivered to the Jury, because when the Parties are dead, their Depositions are the greatest Evidence that the Nature of the Thing is capable of, and equal to Evidence \* *Viva Voce*, and ought to be as carefully considered and examined, which can't easily be, unless they are carried away by the Jury, for the bare reading

<sup>2</sup> Rol. Abr. 587  
Styl. Pr. Regr.  
294.

\* By Word of Mouth.

of them in Court, is not likely to make the same Impression; besides this Evidence does not derive any Credibility from any Act of the *Nisi Prius* Court, but they have it intrinsically in themselves, from the Self-Evidence of their own Seals; and therefore where ever they are removed they remain the same, but if some of the Witnesses are living, it is not the highest Evidence.

2 Stra. 920.  
Barnard, K. B.  
348.

THE second Sort of Copies are those that are not under Seal, and these are of two Sorts;

1. Sworn Copies, and
2. Office Copies.

1<sup>st</sup>, SWORN COPIES, these must be of the Records brought into Court in Parchment, and not of a Judgment in Paper signed by the Master, though upon such Judgment you may take out Execution, for it does not become a permanent Matter, 'till it be delivered into Court, and there fixed as Memorandums or Rolls of that Court, and until it be a Roll of that Court, 'tis transferrable any where, and so doth not come under the Reason of Law, that permits us to give a Copy in Evidence.

Vent. 257.  
Styl. Pr. Reg.  
205.  
Mod. 117.  
Salk. 285.

WHERE a Record is lost, a Copy of it may be read without swearing a true Copy, for the Record is in the Custody of the Law, and not of the Party, and therefore if lost, there ought to be no Injury arising



to the Party's private Right, and consequently if it be lost, the Copy must be admitted without swearing any Examination concerning it, since there is nothing with which the Copy can be compared, and therefore it must be presumed true without Examination. L. E. 89. pl. 18.

BUT in such Cases as these, the Instruments must be according to the Rules required by the Civil Law: They must be \* *Vetustate Temporis, aut Judiciaria Cognitione roborata.* Carvin. Dig. 292. Mod. 117.

So the Copy of the Decree of Tithes in Vent. 257. London, has been often given in Evidence without proving it a true Copy, because the Original is lost.

So a Recovery of Lands in Antient Ibid. Desmeine was given in Evidence, where the Original was lost, and Possession had gone a long Time according to the Recovery.

WHEN a Man gives in Evidence the sworn Copy of a Record, he must give the whole Copy of the Record in Evidence, for the precedent and subsequent Words and Sentence may vary the whole Sense and Import of the Thing produced, and give it quite another Face; and therefore so much at least ought to be produced as concerns the Matter in Question. Tri. per Pais 166. 3 Inst. 173. Post. 27. Ante 17.

\* Corroborated by Length of Time or judiciary Cognizance.

Secondly, Office Copies may be given in Evidence.

HERE the Difference is to be taken between a Copy authenticated by a Person trusted to that Purpose, for there that Copy is Evidence, and a Copy given out by the Officer of the Court that is not trusted to that Purpose, for that is not Evidence, without proving it actually examin'd.

THE Reason of the Difference is, that where the Law hath appointed any Person for any Purpose, the Law must trust him as far as he acts under the Authority that the Law has lodged in him; otherwise it would be to give Credit to another Officer and not to him at the same Time.

Pl. Com. 110. b.

THEREFORE the Chirograph of a Fine is Evidence to all Persons of such a Fine, for the Chirographer is appointed to give out Copies between the Parties of those Agreements that are lodged of Record, and therefore his Copy must be admitted as Evidence without further Dispute.

Sec 10 An. c. 18.  
§ Geo. 2. c. 6.  
sect. 24.

So where a Deed is enrolled, the Endorsement of that Enrollment is Evidence, without further Proof of the Deed, because the Officer is intrusted to authenticate such Deeds by Enrollment; and when such Officer endorseth, that he hath done it pursuant to the Law, then the Law which entrusted him with

with the Authority of doing it, ought to give Credit to what he has done.

BUT if an Officer of the Court, who is not entrusted to that Purpose, makes out a Copy, they ought to prove it examined; the Reason is, because being no Part of his Office, he is but a private Man, and a private Man's meer Writing or Word ought not to be credited, without his Oath.

THEREFORE 'tis not enough to give in Evidence a Copy of a Judgment, tho' it be endorsed to have been examined by the Clerk of the Treasury, because 'tis not Part of the necessary Office of such Clerk: For he is only intrusted to keep the Records, for the Benefit of all Men's Perusal, and not to make out Copies of them.

So if the Deed inrolled be lost, and the Clerk of the Assize makes out a Copy of the Inrollment only, this is no Evidence, without proving of it examined, because the Clerk is intrusted to authenticate the Deed itself by Inrollment, and not to give out Copies of the Inrollment of that Deed.

Records, Recoveries, &c.

BUT the Office Copies of Depositions are Evidence in *Chancery*, but not at Common Law, without Examination with the Roll; for the Court of *Chancery* have for Convenience allowed their Office Copies to be Evidence



Evidence in their own Court, and have im-  
powered their Officers to make out such  
Copies as should be Evidence, but the par-  
ticular Rules of their Court are not taken  
Notice of by the Courts of Common Law.

Chutel and  
Pound.

Trin. Ass. 1700.

WHERE a Fine with Proclamations is to  
be a Bar to a Stranger, there the Proclama-  
tions must be examined, from the Roll, for  
the Chirographer is authorized by the Com-  
mon Law to make out Copies to the Parties  
of the Fine itself, yet is not appointed by  
the Statute, to copy the Proclamations, and  
therefore his Indorsement on the Back of the  
Fine is not binding.

Sec Tri. per Pais  
209.

HAVING thus shewn how the Record is  
to be given in Evidence, by the proving a  
Copy, we must in the next Place see in  
what Manner, and in what Cases, they ought  
to be Evidence.

AND here in the first Place, 'tis regularly  
true, that when the Record is pleaded and  
appears in the Allegations, it must be tried  
on the Issue \* *Nul Tiel Record*; but where the  
Issue is upon Fact, the Record may be given  
in Evidence to support that Fact.

Style 22.  
Sid. 145.

WHEN the Issue is \* *Nul Tiel Record*, the  
Record must be brought § *Sub pede Sigilli*, but  
where the Record is offered to a Jury, any  
of the forementioned Copies are Evidence.

\* *No such Record,*

§ *Under Seal.*

**BUT**

BUT out of this Rule there is an Exception, that where the Record is Inducement, and not the Gift of the Action, there it is not of itself Traversable, but must be given in Evidence on the Proof of the Action, for nothing can be of itself Traversable, that doth not make a full End of the Matter in Question.

Sid. 145, 146.

WHEN any Person produces a Record, it must be so much at least as concerns the Matter in Question, for it is no Evidence, unless you shew the whole Import of the Matter, for the preceding or following Words may give it quite another Face.

Tri. per Pain  
166.  
3 Inst. 173.  
Mod. 117.  
Ant. 23.

WHERE a Recovery is antient, you need not prove any Seisin in the Tenant to the *Præcipe*, but otherwise it is in a Modern Recovery; for in an antient Recovery, the Presumption is for the Recoveror, for the Recoveror shall be supposed to be seised at the Time of the Recovery, since he hath been seised ever since; but in a modern Recovery the Seisin must be proved, because the *Præcipe* doth not lie against the Person that is seised of the Freehold, and so the Recovery wants a Foundation, because the Action is not prosecuted against the Tenant of the Freehold.

Mod. 117.

TENANT for Life, the Remainder in Fee, and he in the Remainder in Fee suffers a Common Recovery with single Voucher, and this Recovery is Antient: The Court will presume

Vent. 257.  
2 Stra. 1129,  
1185, 1267.

presume a Surrender of the Tenant, because when there hath been a constant Enjoyment under that Recovery, it shall be supposed to be a lawful Foundation, because unless there had been a lawful Tenant to the *Præcipe*, it must be supposed, that it would have been controverted and overthrown\*.

Vent. 257.

BUT if there be Tenant for Life, the Remainder in Fee, and he in Remainder suffer a Common Recovery with single Voucher, and this Recovery is Modern, this Record will not give a Title, for the Freehold is in Tenant for Life, and the *Præcipe* ought to be brought against him; and so there is no lawful Action commenced.

Moor 256.

pl. 402.

2 Rol. Abr. 395.

Pig. of Rec. 36.

IF there be Tenant for Life, with Remainder in Tail, and they both join in a Common Recovery with single Voucher, this will not bar the Tail, because the Remainder Man is not Tenant to the *Præcipe*; and in this Case the *Præcipe* is brought against them both as Joint Tenants, and he in Remainder hath no immediate Estate of Freehold in him, and the Remainder Man is not bound by the Recovery had against the Tenant for Life, unless he comes in upon the Aid Prayer, tho' the Remainder is turned to a Right, by such Recovery.

2 Rol. Abr. 395.

BUT if there be Tenant for Life, the Remainder in Tail, and they suffer a Reco-

\* By Stat. 14 Geo. 2. c. 20. sect. 4. Purchasers in Possession may, after 20 Years, produce the Deeds making a Tenant to the *Præcipe*, as Evidence of a Recovery.

very,



very, and come in as Vouchees on the double Voucher; then he in Remainder is barred, because he in Remainder is as properly call'd in as Vouchee, as if he had been call'd in on the Aid Prayer of Tenant for Life, and then when he takes up the Defence, and makes Default, then he must be barred by the Judgment, as for the want of a Title appearing; for where any Person is properly in Court, and doth not defend his Title, he is as properly barr'd as he which hath no Title at all; and when Tenant in Tail is barr'd for want of Title, the Issue can never after recover in his *Formedon*.

If a Verdict be had on the same Point, and between the same Parties, it may be given in Evidence, tho' the Trial was not had for the same Lands; for the Verdict in such Cases is a very persuading Evidence, because what twelve Men have already thought of the Fact, may be supposed fit to direct the Determination of the present Jury; for to go contrary to what a former Jury have decided in Relation to any Fact, is to arraign the Honesty and Sincerity of their Judgment; and there is that Common Credit to be given to twelve Men of the Country, discerning of any Fact upon their Oaths, that no second Jury ought rashly to depart from their Judgment: Their Verdict also further stands in Credit, because the Jury must be supposed honest Men, and Men of clear Reputation, because their Verdict was not attained by the Party against whom it was given.

Lewis and  
Clerges,  
Term. Pasch.  
1700.  
Trial at Bar.

Lewis and  
Clerges.

BUT

Lewis and  
Clerges.

BUT then the Verdict ought to be between the same Parties, because otherwise, a Man would be bound by a Decision, where he had not the Liberty to Cross-examine, and nothing can be more contrary to natural Justice, than that any Body should be injured by any Determination that he was not at Liberty to controvert; for that is to set up a Decision unexamined, in Prejudice of a Cause that is under Examination; besides, one that is not Party to the Trial, has no Redress for the Injury if the Verdict were false, for he can't have an Attaint, and therefore ought not to be injured by the Verdict.

Ibid.  
See Stra. 308.  
2 Str. 1151.  
See Carth. 79,  
181.  
5 Mod. 386.  
2 Jones 221.  
2 Mod. 142.

BUT it is not necessary that the Verdict should be in Relation to the same Land, for the Verdict is only set up to prove the Point in Question; and if the Verdict arise upon the same Question, then 'tis no Doubt a good Evidence, for every Matter is Evidence, that amounts to the Proof of the Point in Question.

#### Verdicts given in Evidence.

2 Sid. 325.

IN an Action of Trespafs, the Indictment for the same Trespafs and Verdict for the same Trespafs, shall not be given in Evidence, if the Indictment be only found on the Party's own Oath; for if the Party's Oath be no Evidence in his own Cause (as we shall hereafter shew that it is not) then can't the Verdict

Verdict be any Evidence that is founded only on the Party's own Oath; for what can't be Evidence directly, can't be made Evidence by any such Circuity.

BUT where the Verdict on the Indictment is founded on another Evidence, besides the Party's own Oath, there the Verdict may be given in Evidence; for there this Verdict seems to be under the same General Rule with all others, and there the Judgment of twelve Men on the Fact, ought to sway in Determination of the same Fact, whether the Verdict be on Indictment or Action: But yet it may be objected, that the Fact might find Credit from the Party's own Oath, which ought not to support the Action, and since the Evidence is so intermix'd, that it doth not appear on what it was founded, the Verdict cannot be produced in Corroboration of the Evidence on the Action.

This is the Practice ex Relatione  
Mr. Phipps,  
1700.

Objections

It is true, this doth in Part take off the Force of such Evidence; for, as when a Verdict is produced in Evidence, it may be answer'd, that it did not arise from the Merits of the Cause, but from some formal Defect of the Proof, and that makes it no Evidence, toward gaining the Point in Question; so a Verdict may be diminish'd in Point of Authority, by shewing that it was in Part founded on the Oath of the Party interested in the Action; and the Jury are to respect it no further than as they presume it given, and  
sup-

Answer.



supported by the Credit of other Testimony that are not concerned in the Cause.

2d Objection.

YET others have said the Verdict given on the Indictment cannot be given in Evidence, because on that Prosecution there is no Liberty left to the Party to attaint the Jury, as he hath Power to do, if injured on a Civil Action; therefore quere.

2 Sid. 325.  
L. E. 31. pl. 66.

IN an Appeal the Verdict on the Indictment can't be given in Evidence, for where the Life of a Man is concerned, the Jury must weigh and consider it from the Evidence then offered, and not from any Precedent of what had been formerly done by others; for in the Case of Blood it seems inconvenient and dangerous that the Determination should be governed by any Thing out of the Evidence, especially since by the Policy of the Common Law, there could be no double Trial, and one Acquittal was always a Bar to another.

Now when the Statute of *Hen. 7.* altered that, and made the Indictment cotemporary with the Appeal, it never intended they should have any Relation to each other.

A VERDICT in a criminal Case, where the Matter was Capital, was denied to be given in Evidence in a Civil Case; as where the Father was acquitted on an Indictment, for having two Wives, this could not be given in Evidence, in a Civil Case, where the Va-

lidity of the second Marriage was controvert-  
ed; the Reason seems to be; because much  
less Evidence is necessary to maintain the  
Action, than to attain the Criminal; and  
therefore his Acquittal was no Argument  
that the Fact was not true.

If a Verdict be given against the Defen-  
dant on the same Point, though another Par-  
ty were Plaintiff, yet in some Cases it may  
be given in Evidence; as if there be a Trial  
of Title between *A.* Lessee of *E.* and *B.* and  
afterwards there be a Trial of the same Title  
between *C.* Lessee of *E.* and *B.*; *C.* may  
give the Verdict found against *B.* in Evidence  
upon the Trial between him and *B.* for this  
was the Sense of a former Jury on the Fact.  
In which Trial *B.* had the Liberty to Cross-  
examine, though the same Fact had been al-  
ready decided against *B.*

Trials. Aff. 1703.

If there be an Ejectment brought against  
several Persons, and there be a Verdict against  
one, that Verdict can't be given in Evidence  
against the rest, for 'tis the Party against  
whom the Verdict is given, that can have  
Relief by Attaint; in as much as the Residue  
are not prejudiced; and these Parties shall  
not be injured by a Verdict they had not the  
Power to controvert.

3 Mod. 142.  
Ld. Raym. 1193.  
Verh. 413.  
Ch. Pre. 212.  
12 Mod. 319,  
339.  
10 Mod. 292.  
Gilb. Rep. 2.  
Stra. 1151.  
See Carth. 79,  
181.  
5 Mod. 386.  
2 Jones 221.  
2 Mod. 142.  
L. E. 91. pl. 23.

If a Man has two Wives, and be thereof  
convicted, and dies, and the second Wife

3 Mod. 164.  
Ld. Raym. 68,  
809, 850, 1101.  
12 Mod. 35, 40.  
Gilb. Rep.  
2 Stra. 960, 961.

319, 339, 432, 610. 11 Mod. 224. 10 Mod. 386. 8 Mod. 181. 156, &c. Fitzgib. 164, 175, 276, &c. 204, &c. Stra. 79.

D

claims

claims Dower, the Verdict and Conviction cannot be given in Evidence, but in this Case the Writ must go to the Bishop; for whether the Marriage be lawful or not, is the Point in Controversy, and that is of Ecclesiastical Jurisdiction, and is not to be decided at Common Law.

BUT the Verdict may be made an Exhibit in the Cause before the Bishop to induce him to believe there was a former Marriage.

Lord Howard  
and Lady Inchiquin, 1700.  
Hard. 472.

BUT this Rule of giving Verdicts in Evidence on the same Point, is to be taken with great Restriction; for no Body can take Benefit by a Verdict that had not been prejudiced by it, had it gone contrary; and therefore if a Termor for Years had recover'd against *B.* the Reversioner might give such Verdict in Evidence, for *B.* has no Prejudice, because he hath the Liberty to Cross-examine the Witnesses, and to attaint the Jury, and 'tis fit the Reversioner should make use of the Verdict, and have Benefit by it, since he had been dispossess'd by the Verdict, if it had gone against the Termor, and therefore he may offer it in Evidence; so if there were Tenant for Life, the Reversion in Fee, and *B.* brings his Action in Ejectment against the Tenant for Life, and a Verdict is given against the Plaintiff, it seems that the Reversioner might have given this in Evidence against *B.* because he would have been prejudiced in Case *B.* had recovered, for his Reversion would have been turned  
to



to a naked Right in him. \* *Quere, et vid. infra.*

BUT a Person that hath no Prejudice by the Verdict can never give it in Evidence, tho' his Title turns upon the same Point, because if he be an utter Stranger to the Fact, 'tis perfectly *Res Nova* between him and the Defendant, and if it be no Prejudice to the Plaintiff, had the Fate of the Verdict been as it would, he cannot be intitled to reap a Benefit; for it would be unequal, that since the Cause is a new Matter between the Parties, that the Jury should be sway'd by any Prejudice; for the letting in of Prejudgments, supposes that the Cause has been already decided, and that it is not tried and debated as a new Matter, but as the Effect of some Litigiousness in the Defendant that holds out the Possession, when the Cause has been decided against him, and this Prejudice ought not to be thrown upon him on a new Enquiry.

As if *A.* prefers a Bill against *B.* and *B.* exhibits his Bill, in Relation to the same Matter against *A.* and *C.* and a Trial at Law is directed, *C.* cannot give in Evidence, the Depositions in the Cause between *A.* and *B.* but it must be tried entirely *§ ut Res Nova.*

*Ibid.*  
Rushworth;  
Viscountess of  
Pembroke and  
Currier.  
L.E. 108. pl. 622.

*A.* Lessee of *B.* brings an Ejectment against *D.* and the Verdict goes for the Defendant; this may at any Time be given in

\* *Quere, and see hereafter.* *§ A new Matter.* *§ As a new Matter.*

Evidence against *B.* for the Possession of *B.*'s Lessee is his own Possession, in as much as the Lessee doth only \* *tenere in nomine alieno*, and *B.* might in this Case give any Thing in Evidence, as well as the Plaintiff himself, and Challenges might have been made to the Jury for Consanguinity to *B.* the Reversioner: Now then since *A.* hath the Possession of *B.* as his Bailiff, if there be a Verdict against that Possession, it must conclude *B.* since he had in this Case, all Liberty to Cross-examine as well as *A.* himself, and by Consequence, this Verdict must be Evidence against any other Lessee of *B.*

Hard. 426.  
per Glynn.

BUT if there be a Recovery against Tenant for Life, by Verdict, this is no Evidence against the Reversioner, for the Tenant for Life is seised in his own Right, and the Possession is properly his own, and he is at Liberty to pray in Aid of the Reversioner or not, and the Reversioner cannot possibly controvert the Matter where no Aid was prayed, for he had no Permission to interest himself in the Controversy.

Per Opini. J.  
Dod. in the Case  
of the Vicar of  
Rolvend.

AN antient Verdict in Prohibition, where the Custom of Tithing is set out, whether it might be given in Evidence against another Parishioner that was not Party to the Verdict, nor had the Lands in Question; and held by some that it might be given in Evidence, because it could not be supposed to have been a Contrivance to alter the Custom, because it appeared to be antient, and therefore

\* *Hold in another's Name.*

fore there can be no other Proofs but of this Sort of what was then thought to be the Custom.

*Verdicts Evidence.*

If a Verdict were given against *J. S.* and then Judgment were arrested, and then *J. S.* aliens to *J. N.* it seems that the Verdict given against *J. S.* may be given in Evidence against *J. N.* for the Alienation of *J. S.* cannot put *J. N.* in a better Condition than *J. S.* was, for the Substitute of *J. S.* can but succeed into his Place, and at the Time of the Alienation, the Verdict might have been given in Evidence against *J. S.* and *J. S.* cannot by Alienation destroy the Advantage that his Adversary ought to derive from the Verdict; for tho' *J. N.* had not the Liberty to Cross-examine upon his Title, yet *J. S.* had, and *J. N.* has but his Title, and therefore could not be supposed to make the Fact better on the Examination.

2 Rol. Abr. 639.  
3 Mod. 142.  
Ante 33.

In an Information by the Attorney General for the King, when the Jury are ready to give a Verdict, \* the Attorney General may withdraw a Juror, for this is Part of the Prerogative, and is in room of the Nnosuit of the Subject, for the King can't be non-suit, being always in Court, and this Prero-

2 Rol. Abr. 679.  
pl. 10.  
Vent. 28.  
Raym. 84.  
2 Stra. 984.

\* Holt says it was the Opinion of all the Judges of England, that it must be by Consent. Carth. 465. 2 Keb. 507.



gative is derived out of a general Reason of the King's Employment for the publick Safety; and therefore if he hath fail'd in any Point of Proof, so that Disadvantage may be expected from the Verdict, it shall be at his Election, whether he will receive his Verdict or not; and therefore in a Second Information, none of the first Jury shall be admitted to give in Evidence, that they were agreed in their Verdict, for such Evidence would be of the same Weight, as if the Verdict had been given, and thereby the King would be dispossest'd of the Benefit of his Prerogative.

2 Rol. Abr. 680.  
Tri. per Pais  
213.

BUT if the King aliens the Estate on which the Trial was had, so that it comes into private Hands, there on a second Trial between private Persons, the Agreement of the Jury may be given in Evidence, for the Prerogative is annex'd to the Crown, and cannot extend to any private Person, and therefore they take the Estate with the Disadvantage of having a Verdict against them.

2 Rol. Abr. 679.  
2. 3.

BUT then on such Trial they must have the Record of the Proceedings, on the first Information, because as a Verdict cannot be given in Evidence, without the Record, which gave Authority to the Jury to proceed, no more can they give in Evidence, the Agreement of the Jury without the Record on which they were impanelled.

A Man

A Man has two Manors called *Dale*, and levies a Fine of the Manor of *Dale*; Circumstances may be given in Evidence, to prove which Manor he intended; for since the Fine is uncertain, by the Identity of the Name, it is fit that it should be reduced to a Certainty by Proof, that the Fine may not lose the Operation which the Parties intended.

2 Rol. Abr. 676.  
a. 11.

In \**Plene Administravit*, the Execution executed cannot be given in Evidence, without the Judgment, because there appears to be no Authority for such Execution without the Judgment; for where the Execution is of Record, and the Authority for such Execution is also of Record, they must both appear to the Jury, otherwise they have not the uttermost Evidence of the Fact in Question.

Guildhall, per Holt.  
Tri. per Pais 227.

UPON \**Plene Administravit*, an Account given in to the Ordinary, can be no Evidence, nor is it to be any way regarded.

2 Rol. Abr. 678.  
Turvie's Case,  
Tri. per Pais 235.

IN Debt against the Executor, the Defendant pleads that the Testator was taken in Execution by a *Capias ad Satisfaciend*, and found that he was taken in Execution on an *Alias Capias*; this is well enough, for an *Alias Capias* is but renewing of the same *Capias*, and doth not differ from it in Substance, but in Circumstance only, as being the second Process of the same Nature; but if they had found that he had been taken in

\* Fully administered.

D 4

Exe-

Execution, by a *Capias pro Fine*, or by a *Capias Uilagatum*, this had not maintained the Plea, because these are not the same Sort of Executions with the *Ca. Sa.* but are in their Nature distinct; and when the Jury finds that the Party was taken in Execution upon the *Alias Capias*, it shall be intended upon the same Judgment without any Averment, because the Doubt exhibited to the Court, shall not be intended quite foreign to the Matter, but arising out of it; and therefore it must be intended an *Alias Capias* on the same Judgment, otherwise there would be no Reason to prefer it as a Doubt, for 'tis out of Controversy, that a *Capias* upon another Judgment could not possibly maintain the Plea.

## Writs.

Tut. per Pais  
167.

WHEN a Writ out of Court is only Inducement to the Action, the taking out the Writ may be proved without any Copy of it, because possibly it might not be returned, and then 'tis no Record, and therefore the Copy of it is not required; but where a Writ itself is the Gift of the Action, you must have a Copy from the Record, in as much as you are to have the uttermost Evidence the Nature of the Thing is capable of.

IN an Action of Trespass against a Bailiff for taking of Goods in Execution, the Bailiff must not only give in Evidence for his Defence on Not Guilty, the Judgment, but he must also shew the Writ of Execution,  
by



by Virtue of which he took the Goods, and 'tis not enough alone to shew the Sheriff's Warrant on the Writ, for when the Writ of Execution is returned, as it is presumed to be immediately after the Execution served, it is of Record, and a Record can be proved by nothing less than itself, and the Warrant on the Writ is no Proof of the Record itself.

Quere was this offered in Mitigation of Damages, or to the Action? it seems it was to the Action, because it proves an Alteration of Property, and so not Trespass.

In an Action brought by an Attorney for his Fees, 'tis sufficient to prove the taking out the Writ by a Warrant made by the Coroners, for the Writ may not be returned of Record, and by Consequence is no Record, and then the Warrant made by the Coroners is sufficient to prove a Title to his Fees, for the Attorney in this Case is intitled to his Fees, whether the Writ be returned or not.

Silby and  
Hinckly,  
Trin. Ass. 1701.  
per Gold.

Acts of Parliament.

A GENERAL Act of Parliament is taken Notice of by the Judges or Jury, without being pleaded. \* *Causa patet ant. fol. 10.*

Hob. 227.  
4 Co. 76. 2.  
Noy 124.  
Doct. placit. 336.

BUT a particular Act of Parliament is not taken Notice of by the Court, without being pleaded, for the Court can't judge of

Plowd. 65. 2.  
84. 2.  
Cro. Ja. 112.  
5 Co. 2.

\* The Reason appears before, fol. 10.

particular

particular Laws which do not concern the whole Kingdom, unless that Law be exhibited to the Court, for they are obliged by their Oaths to judge all Matters coming before them \* *secundum Leges et Consuetudines Angliæ*, and therefore they can't be obliged † *Ex Officio*, to take Notice of a particular Law, because it is not § *Lex Angliæ*, a Law relating to the whole Kingdom; therefore like all other private Matters, it must be brought before them to judge thereon.

Hob. 227.

BUT a private Act of Parliament, or any other private Record, may be brought before the Jury if it relate to the Issue in Question, tho' it be not pleaded, for the Jury are to find the Truth of the Fact in Question, according to the Evidence brought before them; and therefore if the private Act brought before them, doth evince the Truth of the Matter in Question, it is as proper Evidence to the Purpose as any Record or Evidence whatsoever.

Ibid.

NAY since such Records are not authentic, it is the properest Sort of Evidence; the Error in this Matter was founded upon the old Notion, that the Jury could not find an Act of Parliament or other Matter of Record, which is false, for the || *Allegata* to the Jury, says *Hobart*, are every Thing that may be offered in Evidence so relating to the Issue.

\* According to the Laws and Customs of England. † By their Office.  
§ The Law of England. || Allegations.

As if the Issue were, whether such Lands were within certain Letters Patent granted by King H. 8. the Defendant may shew the Stat. 35 H. 8. which enacts that Lands should pass, notwithstanding any Mis-recital, and that by this Means, notwithstanding the Mis-recital, the Lands were within the Grant, for tho' this be a private Statute, yet since it relates to the Issue, it may like all other Matters be given in Evidence, for the Stat. is produced to prove that notwithstanding the Mis-recital the Lands might be compriz'd in the Grant.

Hob. 227.  
tho' Dy. 129. B.  
contrary.

BUT there are some Cases in which both Publick and Private Statutes ought to be pleaded; and that is when they make void any Solemnities; for in this Case the Construction of the Law is, not that the solemn Contracts shall be deemed perfect Nullities, but that they are voidable by the Parties prejudiced by such Contracts; and one Reason of this Construction ariseth from the Rule of expounding all Statutes, that \* *Quis potest renuntiare Juri pro se introducto*—  
where any Person has Benefit by a Law he may renounce that Benefit if he will, and refuse to take any Advantage of it; but if these Acts were construed perfect Nullities, that Rule must be laid aside, and the Party must receive Benefit by the Law whether he will or not; and therefore such Acts of Parliament must be pleaded, that the Party may appear to take the Benefit of them.

Vinnius 32, 21.  
in Justinian.

\* Any one may renounce a Right, introduced for his own Benefit.



ANOTHER Reason of this Construction is this, because what shall constitute the Solemnities of a Contract is Matter of Law, and so it is how these Solemnities ought to be defeated and destroyed; and in as much as it is Matter of Law by what Solemnities a Contract is to be construed, therefore when any Action is to be founded upon any solemn Contract, that Contract ought to be preferred to the Court; now it were preposterous that the Law should require that the Contract should be offered to the Court that it might appear to be legally made, and yet that it should not be offered to the Court how it is defeated; both certainly must be determined by the same Judicature, for it is absurd to say that the Court should determine that the Contract was lawfully made, and that the Jury should determine that it was lawfully determined.

5 Co. 119.  
Hob. 72, 166.  
3 Co. 59.

THEREFORE you cannot give the Act of Queen *Eliz.* touching usurious Contracts in Evidence on the general Issue, tho' a general Law, but it ought to be pleaded.

Acts of Parliament, what a Publick, and what a Private Act.

5 Co. 119.  
Hob. 72, 166.  
See Mod. 57.

So the 23 *H. 6. c. 10.* of the Sheriffs Bonds cannot be given in Evidence on the General Issue, but it ought to be avoided by pleading.

So

So a Fine is made void by the Statute of <sup>2</sup> Inf. 336. *Westminster 2. c. 1.* but construed only to be voidable.

AND a Recovery by Wife with a second <sup>4</sup> Co. 59. Husband made void by *11 H. 7.* but construed only to be voidable.

ON an Attaint a particular Act of Parliament can't be given in Evidence that was not given in Evidence to the Petit Jury, for since on the Attaint the former Verdict is called in Question, and the Jury punished for the Iniquity of that Verdict, it follows of Consequence that no more Evidence can be given than was offered to the Petit Jury; for they could not make any Discernment but upon the Evidence offered, and therefore ought not to be called in Question upon a different Evidence.

*Dy. 129. b.  
Hob. 227.*

BUT a general Statute may be offered in <sup>Ibid.</sup> Evidence to the Grand Jury in an Attaint, tho' it was not offered in Evidence to the Petit Jury, because of a general Law every Person that lives under it is supposed to take Notice, and by consequence the first Jury in the Decision were obliged to understand it, otherwise they were obliged to refer it back to the Decision of the Court; for when the Jury take upon them to judge of the whole Matter, they at their Peril do take on themselves the Understanding of the Law, and if the Petit Jury have judged without being apprised

apprised of the General Law of the Kingdom as they ought to be, yet that may be nevertheless offered to the Grand Jury, who may be made sensible of such General Laws on which their Judgments must be founded.

General and Particular Acts.

4 Co. 76.

Now the Distinction between a general and a particular Law is, Whatever concerns the Kingdom in general is a general Law, and whatever concerns a particular Species of Men or some Individuals, is a special Law and must be pleaded.

Ibid.

Doct. placit. 339.

A Law which concerns the King is a general Law, because the Head and Union of the whole Commonwealth.

4 Co. 76. b.

Doct. placit. 337.

10 Ed. 4. 7. a.

A Law that concerns all Lords is a general Law, because it concerns the Property of the Kingdom, being held either mediately or immediately, \* *non ideo puniatur Dominus per Redemptionem.* † Stat. Marl. 52 Hen. 3. cap. 3.

† 2 Inst. 105.

4 Co. 76. b.

Doct. placit. 338.

13 Ed. 4. 8. b.

BUT a Law that only concerns the Nobility or Lords Temporal, is a particular Law, because it relates to no more than to one Set of Persons, as if a Law makes them liable to such or such Process.

Quere, If it relates to the Body of the Peerage as in the House, for as such they

\* So that the Lord shall not be punished by Redemption.

are



are Part of the Legislature, and what relates to the Constitution is a general Law.

WHAT relates to all Officers in general, <sup>4 Co. 76. a.</sup> is a general Law, because it concerns the <sup>Doct. placit. 337.</sup> universal Administration of Justice, as the Stat. of *West. 1. cap. 26.* that no Sheriff or other Officer should take Reward for his Office.

BUT if it relates only to particular Persons, as to the Sheriffs, it is a particular <sup>Ibid.</sup> Law, as the <sup>Dy. 119.</sup> 23 *H. 6. c. 10.*

WHAT relates to all Spiritual Persons is a <sup>4 Co. 76.</sup> general Law, in as much as the Religion of <sup>5 Co. 2.</sup> the Kingdom is the general Concernment of the whole Kingdom, as the 21 *H. 8. 13 El. c. 10.* 18 *El. c. 11.* But what relates to one Set of Persons is particular, as the Act of the 1 *El.* of Bishops Leases.

AN Act that comprehends all Trades is <sup>4 Co. 76. b.</sup> general, because it relates to Traffick in general, but an Act that relates only to Grocers and Butchers, &c. is particular.

If the Point of Law be never so special, <sup>4 Co. 76.</sup> yet if it relates equally to all, it is a general Law; but a Law relating to some Counties or Parishes, is special.

**Publick Matters not of Record, Chancery  
Proceedings.**

THE Things that do stand second in Point of Probability are all publick Matters that are not of Record.

THE publick Matters that are not of Record do all come under this general Definition: They must be such Matters as have an Evidence in themselves, and that do not expect an Illustration from any other Thing; such are the Copies of Court Rolls, and Transactions in Chancery, and the like; and the Copies of such Matters may be given in Evidence, in as much as there is a plain and coherent Proof; for the Matters themselves are supposed to be self-evident, and by Consequence when a Copy of them is produced upon Oath you have a full Proof, because you have proved upon Oath a Matter which when produced would carry its own Light with it, and by Consequence would need no Proof.

**Objection.**

BUT here it will be objected, that this is not the utmost Evidence that the Nature of the Thing is capable of, for these Testimonies themselves must be better than the Copies of them.

To this the Answer is, that the Copy upon Oath is reckoned as an Equivalent to the Thing itself; and the Testimony itself must  
not

not be rigidly required, because since these Matters lye for the publick Satisfaction, every Man has a Right to their Evidence, and in several Places they cannot be at the same Time, and therefore the Things themselves cannot be demanded but only the Copies of them.

THE first Sort of Testimonies that are not of Record are the Proceedings of the Court of Chancery on the *English* Side.

THE Reason why the Proceedings in Chancery, and the Rolls of the Court are not Records, is this, because they are not the Precedents of Justice; for the Proceedings in Chancery are founded only on the Circumstances of each private Case, and they cannot be Rules to any other; and the Judgment there is \**secundum æquum & Bonum*, and not § *secundum Leges & Consuetudines*; and the Reason why any Record is of Validity and Authority is, because it is declarative of the Sense of the Law, and is a Memorial of what is the Law of the Nation: Now Chancery Proceedings are no Memorials of the Laws of *England*, because the Chancellor is not bound to proceed according to Law. Co. Lit. 260. a.

Now because these several Proceedings before-mentioned are not Records, they are by Consequence not such Memorials as are lodged inseparably in any certain Place, but are transferrable from one Place to another, and therefore may be themselves given in Evidence.

\* According to Equity and good Conscience. § According to Laws and Customs.



## Bills in Chancery.

Chan. Caf. 64,  
65.  
2 Sid. 221.  
Eq. Abr. 227.  
pl. 1.  
Nelf. Ch. Rep.  
102.

Chan. Caf. 64,  
65.

2 Sid. 221.  
Keb. 780.  
L. E. 105. pl. 55.

THE Bill in Chancery is Evidence against the Complainant, for the Allegations of every Man's Bill shall be supposed to be true; nor shall it be supposed to be preferred by the Counsel or Solicitor without the Party's Privity, and therefore is Evidence as to the Confession and Admittance of the Truth of any Fact by the Party himself; and if the Counsel hath mingled in it what is not true, the Party may have his Action: But where a Bill is exhibited, and there are no Proceedings upon it, then it cannot be given in Evidence, unless they prove a Privity in the Party, for a Man may file a Bill in another's Name to rob him of his Evidence by a sham Confession, and therefore a Bill filed without any Proceedings upon it has not the Force of an Evidence, for no Man can suppose that the Party did himself file the Bill, without any Proceedings; to bring his Adversary to answer such Bill is of no Use to the Party, and therefore must be supposed rather to be filed by a Stranger to do him an Injury: This is accounted to stand in point of Credibility in the same Circumstances, as a Confession by Letter under the Party's own Hand where no body saw the Writing of it, though some have ranged it in an inferior Degree, because the one is the Party's own immediate Confession, and the other is only the Counsel's Draught; yet it seems the Allegation in a Court

Court of Justice, that amounts to the Confession of any Fact, ought to have more Weight and Authority with it than any private owning.

If a Patron sues a Simoniackal Bond, and the Person prefers a Bill in Chancery to be relieved, the Bill and Proceedings upon it shall be given in Evidence on Ejectment to make void the Person's Living.

Keb. 780.

2 Sid. 221.

A N S W E R S.

AND if the Bill be Evidence against the Complainant, much more is the Answer against the Defendant, and carries still a higher Weight of Probability along with it, because this is delivered in upon Oath, and therefore over and above the single Confession it has an Authority from the Sanction of an Oath.

Godb. 326.

L. E. 106. pl. 57.

BUT when you read an Answer, the Confession must be all taken together, and you shall not take only what makes against him, and leave out what makes for him; for the Answer is read as the Sense of the Party himself, and if it is to be taken in this Manner, you must take it entire and unbroken.

Brochman's Case,

Trin. Aff. 1701.

per Gold.

2 Vern. 194, 288.

5 Mod. 10.

See Ch. Cal. 154.

AN Infant's Answer by his Guardian shall never be admitted in Evidence against him on a Trial at Law, for the Law has that Tendernefs for the Affairs of Infants, that it will not suffer them to be prejudiced by the Guardian's Oath, for the Authority the Law gives to the Guardian, is for the In-

2 Vent. 72.

3 Mod. 259.

Carth. 75.

3 Will. Rep. 237.

L. E. 106. pl. 59.

Answer of a feme

covert, see 3 Will.

Rep. 238.

Salk. 350.

Vern. 60, 109,

110.

fant's Benefit and not to his Prejudice, and therefore the Infant can't be hurt by the Guardian's Oath.

### AFFIDAVIT.

Brochman's Case,  
Trin. Aff. 1701.  
per Gold.  
Str. 35.  
Will. Rep. 675.

ANALOGOUS to this is a Man's own voluntary Affidavit, which may also be given in Evidence against him, but then the Proceedings must regularly be given in Evidence on which this Affidavit did arise, and the Reason why the Proceedings must also be given in Evidence is to prove the Identity of the Person, for to prove an Affidavit sworn is not sufficient, for it may be sworn by Fraud and Contrivance, the Person being personated by some body else, and therefore to bring home the Proof to the Person, you must prove the Occasion of the swearing, for 'tis not to be thought that any Man without some Occasion or other would make a plain Affidavit.

Anon. Hill.  
Vacat. 1707.  
per Cowper.

A Bill was brought by Creditors against an Executor, to have an Account of the personal Estate, the Executor sets forth by Answer, that there was 1100*l.* left by the Testator in his Hands, and that coming afterwards to make up his Accounts with the Testator, he gave Bond for 1000*l.* and the other 100*l.* was given him as a Gift for his Trouble and Pains taken in the Testator's Business, and there was no other Evidence in the Case, that the 1100*l.* was deposited but merely by the Executor's own Oath;  
and



and it was argued that the Answer, though it was put in Issue, should be allowed, since there is the same Rule of Evidence in Equity as at Law; and therefore if a Man was so honest as to charge himself when he might roundly have denied it, and no Testimony could have appeared, he ought to find Credit where he swears in his own Discharge.

BUT it was answer'd and resolved by the Court, that when an Answer was put in Issue, what was confessed and admitted need not be proved, but it behoved the Defendant to make out by Proofs what was insisted upon by way of Avoidance, but this was held under this Distinction; where the Defendant admitted a Fact and insisted on a distinct Fact by way of Avoidance, there he ought to prove the Matter of his Defence, because it may be probable that he admitted it out of Apprehension that it might be proved, and therefore such Admittance ought not to profit him so far as to pass for Truth whatever he says in Avoidance; but if it had been one Fact, as if the Defendant had said the Testator had given him 100*l.* it ought to have been allowed unless disproved, because nothing of the Fact charged is admitted, and the Plaintiff may disprove the whole Fact as sworn, if he can do it; but it was urged that here the Probability was on the Defendant's Side, because he did not take a Bond for this Sum as for the Residue, but the Chancellor said there was some Presumption in that, but not enough

to carry so large a Sum without better Attestation.

3 Mod. 116, 117.  
See Ld. Raym.

451.

2 Ld. Raym. 894,  
936, 1221.

12 Mod. 511.

10 Mod. 74, 108,

109, 194, 195.

3 Will. Rep. 196.

5tra. 545.

IN an Information of Perjury, an Answer may be given in Evidence without any Person to prove that the Defendant swore it, for the Identity may be proved by many Things out of the Answer it self; besides the Party is obliged to sign his Answer, and the Perjury may be further illustrated by the Comparison of Hands, which possibly may be Evidence in Concurrence with other Proof, that out of the Answer itself evince the Identity of the Person.

#### Comparison of Hands.

BUT that the Comparison of Hands only should be a Proof in a Criminal Prosecution, was never Law but only in the Time of *K. 7.* and the Distinction has ever been taken that the Comparison of Hands is Evidence in Civil and not in \*Criminal Cases; the Reason why the Comparison of Hands is allow'd to be Evidence in Civil Matters is, because Men are distinguished by their Hand-Writing as well as by their Faces, for it is very seldom that the Shape of their Letters agree any more than the Shape of their Bodies, therefore the Comparison of Hands serves for a Distinction in Civil Commerce, for the Likeness does induce a Presumption that they are the same, and this Presumption is Evidence till the Contrary appears: For every Presumption that remains uncontested hath the Force

\* 2 Hawk. P. C.

431.

Ld. Raym. 40.

3 St. Tri. 892,

893.

4 St. Tri. 271,

272.

6 St. Tri. 418.

12 Mod. 72.

L. E. 279. pl. 19.

Sidney's Tri. 32,

51.

Force of an Evidence, for a light Proof on the one Side will outweigh the Defect of the Proof on the other; but in Criminal Prosecutions the Presumption is in Favour of the Defendant; for thus far is to be hoped of all Mankind, that they are not guilty in any such Instances, and the Penalty inhances the Presumption: Now the Comparison of Hands is no more than a Presumption founded only on the Likeness, which may easily fail, because they are very subject to be counterfeited; therefore when the Comparison of Hands is the only Evidence in a Criminal Prosecution, there is no more than one Presumption against another, which weighs nothing.

In an Information of Perjury, the Perjury <sup>2 Sid. 418, 419.</sup> assigned was in the Defendant's Answer, *that* <sup>2 Keb. 516.</sup> *he receiv'd no Money*, and on Exceptions for Insufficiency the Defendant says in a second Answer, *that he receiv'd no Money 'till such a Day*; and on the Trial on the Information it was held that nothing should be assigned for Perjury that was explain'd in the second Answer; for the first Answer shall be charitably expounded, according to what appears to be the Party's Sense in the second Answer; for the Court would rather intend there was some Oversight in the Draught, and that it was afterwards amended in the second Answer, than suppose the Party to be guilty of manifest and corrupt Perjury.

WHERE a Man is sworn in Chancery to <sup>2 Sid. 419.</sup> answer directly to his Knowledge, Perjury  
E 4 can't



can't be assign'd in any Thing which is not within his Knowledge, as upon his Belief, &c. for what he swears on his Belief is not within the Compass of his Oath.

### Voluntary Affidavit.

THERE is a very great Difference between the Evidence of an Answer, and that of a voluntary Affidavit.

Michaelmas  
Term 1714.  
in Canc. inter  
Roch & Rix,  
Administrators  
of Howard & al.

AN Answer can't be given in Evidence without producing the Bill, because without the Bill there does not appear to be a Cause depending; but if there be Proof by the proper Officer that the Bill has been search'd for diligently in the Office, and can't be found, there the Answer hath been allowed to be read without a Sight of the Bill; and this Lord Chancellor *Broderick* allowed, tho' the Loss of the Bill was not proved by the proper Officer, but by the Clerk only who wrote in the Office, and swore he search'd carefully with the Officer and could not find the Bill.

Hill. Aff. 1700.

AN Answer is proved by shewing the Allegations in the Court, viz. by shewing the Bill which is the Charge, and the Answer which is as it were the Defence to the Bill; and this in Civil Cases shall be intended to be sworn, because the Proceedings upon such Defence are upon Oath: Now since the Proceedings of any Court of Judicature within the Kingdom are good Evidence in other  
2 Courts,

Courts, and the Proceedings in this Case are upon Oath, it follows of Consequence, that in all Civil Cases the Answer is to be taken as an Oath, without any further Proof but from the Proceedings in the Cause.

BUT a voluntary Affidavit is not Part of any Cause in a Court of Justice, and therefore it must be prov'd to be sworn; for if you only prove it signed by the Party, the Proof goes no farther than to suppose it as a Note or Letter, and as such you may not give it in Evidence without more Proof, for a Note or Letter is a bare Acknowledgment under the Hand of the Party, and this is no more unless you prove it to be sworn also, for it can't be presumed to be sworn being not filed as an Oath in a Court of Justice.

Vern. 53, 413.  
Ld. Raym. 311,  
734.  
2 Ld. Raym.  
893, 936.  
2 Vern. 471, 547,  
555, 591, 603.  
Ch. Pre. 59, 116,  
212.  
3 Mod. 36.  
9 Mod. 66.  
11 Mod. 210,  
262.  
12 Mod. 136,  
231, 305, 310,  
319, 339, 342,  
375, 394, 414,  
494, 500, 521,  
555, 565, 579,  
607.  
L.E. 121. pl. 92.

SUCH are the Affidavits made before a Master in Chancery by the Vendor of the Estate, in Satisfaction of the Purchaser, that the Estate is free from all Charges and Incumbrances.

AN Action of Covenant brought against two, the Affidavit of one of them was given in Evidence as an Acknowledgment of them both, because the Acknowledgment of one of them where they had a joint Interest was to be looked upon as a Truth relating to them both, and the Consideration of the Matter is to be left to the Jury how far it is Evidence against the other.

Vicary's Case in  
the Exch.

THE second Difference between them is, that the Copy of an Answer may be given

3 Mod. 116.  
Before 54.

in Evidence, but the Copy of a voluntary Affidavit cannot; the Reason is, because the Answer is an Allegation in a Court of Judicature, and being Matter of publick Credit, the Copies of it may be given in Evidence for the Reason formerly mentioned, but a voluntary Affidavit hath no Relation to any Court of Justice, and therefore is not intituled to publick Credit, and being a private Matter, the Affidavit itself must be produced as the best Evidence.

Style 446.  
Before 57.

BUT the voluntary Affidavit of a Stranger can by no Means be given in Evidence, because the opposite Party had not the Liberty to cross-examine; but of this in the next Section.

## DEPOSITIONS.

THE next Thing is the Depositions; and here we must in the first Place consider what Rank they stand in in point of Credibility; and to enlighten this Matter we must give an Account of their original Use; and they plainly come over to us from the Civil Law. It is very plain that the Parties exhibited their Interrogatories upon their several Allegations, but that the Witnesses were privately examined upon these Interrogatories by the same Judge that tried the Cause; so that the Course antiently among the *Romans* is very different from the modern Pleadings of the Chancery, where the Sense of the Witness is stated by the Examiner, on which the Chancellor is to judge.

THAT



THAT this which I have mentioned was the antient Course of the Civil Law is very plain from *Adrian's Epistle to Varus the Legate of Cecilia*, \* *Tu magis scire potes quanta Fides habenda sit Testibus, qui & cujus Dignitatis, & cujus æstimationis sint, & qui simpliciter visi sint dicere, utrum unum eundemque meditatam sermonem attulerint, an adeoque interrogaveras ex tempore veri similia responderint.*

Dig. Lib. 22.  
Tit. 5. §. 3. de  
Test. pag. 728.

Now these Examinations were first made privately, that the Judge might in the first Place be possessed of the naked Fact, and the Sense of these Witnesses was after taken in Writing, and then Publication pass'd, that the Judges might have all due Assistance from the Observation of the Advocate, if he had not sufficiently compared and weighed the Examination; as the Trials of the Civil Law thus stood when the Judges viewed the Behaviour of the Witnesses, there is very little Difference between this Trial and that of the Jury, save only that this Sort of Trial by Jury is much more speedy and the Evidence is more entire, whilst in the other way the Judges take up the Evidence at one Time and the Gloss at the other, and such breaking of the Evidence may be dangerous to a weak and less considering Judge; besides the Judge not being

\* You may the better judge what Credit Witnesses deserve, what Sort, of what Dignity and Esteem they are, and who seem to speak the Truth, and whether they bring one and the same consistent Account, if being suddenly interrogated, they give probable Answers, and such as are agreeable to Truth.

*The Law of Evidence.*

of the Neighbourhood can't so easily distinguish the Credit of the Witnesses, and upon this Account also the Trial by Jury is preferable to the Examination of the Civil Law when under the best Regulation.

AND no Doubt in our Chancery Proceedings the Witnesses were formerly examined by the Masters who sat in the Court to inform the Chancellor of their Credibility, 'till Causes so multiplied, that the Masters were employed in other Affairs, and so the Examination of Witnesses was left to the Examiners.

Now since this Practice has been used, no Doubt but that the Credit of Depositions \* *cæteris paribus* falls much below the Credibility of a present Examination † *viva voce*, for the Examiners and Commissioners in such Cases do often dress up secret Examinations, and set up a quite different Air upon them from what they would seem if the same Testimony had been plainly delivered under the strict and open Examination of the Judge at the Affizes.

BUT tho' the Depositions do fall short of Examinations † *viva voce*, yet they seem superior to what a Witness said at a former Trial; for what is reduced to Writing by an Officer sworn to that Purpose from the very Mouth of the Witness, is of more Credit than what a Stander-by retains in Memory of the same Oath; for the Images of Things decay in the Memory, by the perpetual

\* Other Circumstances being equal. † By Word of Mouth.

Change of Appearances; but what is reduced to Writing continues constantly the same; so that we cannot be certain on a verbal Attestation, but that some Circumstances of the Fact may be lost in the Recollection. We must in the next Place see in what Cases Depositions may be read.

1st, THEY may be read where the Witnesses are dead, for where the Witness is living, they are not the best Evidence the Nature of the Thing is capable of, and therefore cannot be read, but where the Witness is dead, the Deposition is allowable: For as Records are the Invention that perpetuate the Decisions of Law, so are Depositions the only Method to perpetuate the Memory of the Fact, and therefore they must be trusted where the Witness is not in Being.

Godb. 193, 326.  
2 Stra. 920.  
Barnard. K. B.  
348.  
2 Bac. Abr. 305.  
Gilb. Chan. 140.  
Salk. 278, 281,  
286.  
4 Mod. 146.  
S. C. Show. 363.  
2 Salk. 555, 691.  
T. Raym. 170.  
See Hob. 112.  
2 Ro. Rep. 679.  
Hardr. 232, 315.  
T. Raym. 335,  
336.  
Lil. Abr. 388,  
554. 5 Mod. 9, 163, 277.

2dly, WHERE a Witness is sought and can't be found, you may upon Oath of the Matter use his Depositions; for when it doth appear by Oath that he cannot be found, 'tis the best Evidence that possibly can be had of the Matter; for when a Witness is sought and can't be found, he is in the same Circumstances as to the Party that is to use him, as if he were dead.

Godb. 326.  
L. E. 106. pl. 27.

3dly, IF it be proved that a Witness was subpoenaed and fell sick by the Way, his Deposition may be allowed to be read, for in

Mod. 283, 284.  
11 Mod. 210,  
225, 226, 263,  
Fitzgib. 197.  
12 Mod. 215,  
231, 305, 319.  
339, 375, 403, 607. Will. Rep. 288, 289, 414, 415, 557. 2 Will. Rep. 563.  
Ld. Raym. 729, 730, 734, 735. 2 Ld. Raym. 873, 1166, 1371. Vern. 331,  
413. Pre. Ch. 64. Eq. Abr. 227. 2 Stra. 920. L. E. 180. pl. 13.

this



this Case the Deposition is the best Evidence that possibly can be had, and that answers what the Law requires.

Chan. Caf. 73.  
Eq. Abr. 227.  
pl. 2.

BUT Depositions taken thirty Years since were admitted to be read in Chancery, though the Parties were not the same, in as much as the Cause related to the same Land, and the Tertenants were Parties to it, and those Witnesses are since dead, the Plaintiff's Title then not appearing. And this is an Indulgence of the Chancery beyond the strict Rules of the Common Law, and is admitted for the pure Necessity, because Evidence should not be lost; besides, Chancery hath great Faith in its own Examiners, that are supposed indifferent Persons that do by themselves take the Sense of the Parties so strictly, that by that Means the Depositions stand the fairer to be read at any Time. Quere.

Hard. 472.

4thly, A Deposition can't be given in Evidence against any Person that was not Party to the Suit, and the Reason is, because he had not Liberty to cross-examine the Witnesses, and 'tis against natural Justice that a Man should be concluded in a Cause to which he never was a Party.

Ibid.

5thly, A Man shall never take Advantage of a Deposition that was not Party to the Suit, for if he cannot be prejudiced by the Deposition, he shall never receive any Advantage from it, for this would create the greatest Mischief that could be; for then a  
Man

Man that never was Party to the Chancery Proceedings, might use against his Adversary all the Depositions that made against him, and he in his own Advantage could not use the Depositions that made for him, because the other Party not being concerned in the Suit had not the Liberty to cross-examine, and therefore cannot be encountered with any Depositions out of the Cause.

6thly, DEPOSITIONS before an Answer put in are not admitted to be read, unless the Defendant appears to be in Contempt, for if a Cause doth not appear to be depending, then are the Depositions considered as voluntary Affidavits, for unless a Suit is shewn to be commenced, it doth not appear that the adverse Party had Liberty to cross-examine; but if the adverse Party had been in Contempt, then the Depositions of the Witnesses shall be admitted, for then it is the Fault of the Objector that he did not cross-examine the Witnesses, since he would not join the Examination of the Witnesses.

Raym. 335.  
L.E. 114. pl. 76.

WHEN the Bill is dismissed, the Rule as to the reading of the Depositions is this, Where the Bill is dismissed because the Matter is not proper for Equity to decree, yet the Depositions on the Fact in the Cause may be read afterwards in a new Cause between the same Parties, for though the Matter is not proper for Equity to decree, yet there was a Cause properly before the Court, for 'tis proper for the Jurisdiction of Equity to consider how

Ch. Caf. 175.  
L. Raym. 735.  
Backhouse and  
Middleton.

how far the Law ought to be relaxed and moderated, and where there is a Cause properly before the Court, for whomsoever that Cause be decided, yet the Depositions in that Cause must be Evidence, as well as in all others.

Cha. Caf. 175.

BUT if a Cause in Equity be dismiss'd, for the Irregularity of the Complainant, the Depositions in that Cause can never be read; as where a Devisee, on a Suit pending by his Devisor, brings a Bill of Revivor and several Depositions are taken, and then the Cause on the Hearing is dismiss'd, because a Devisee claiming as a Purchaser, and not by Representation, can't bring a Bill of Revivor in this Case, and in a new Original Bill exhibited, the Devisee cannot use the former Depositions; for in the first Cause, mistaking the Bill that he ought to bring, there was no Complaint before the Court, since the Court doth not allow any Devisee to complain in that Manner by Right of Representation, and there being no Cause regularly before the Court, there could be no Depositions in it.

Ibid. 236.

IN Cross Causes in Equity, an Agreement was proved in one of the Causes, and in that Cause it was not set forth in the Allegations of the Bill nor Answer, in the other Cause the Agreement was set forth in the Bill, and not proved in the Cause, and an Order was obtained before Publication, that the same Depositions should be read in both Causes; and by the better Opinion this might be,



be, but since the Order was before Publication in the second Cause, the Defendant had Liberty to Cross-examine the Witnesses on which Particulars he pleased, and the Sight of the Depositions was to his Advantage.

If a Witness be examined \* *De bené esse*, and before the coming in of the Answer, the Defendant not being in Contempt, the Witness dies, yet his Deposition shall not be read, because the opposite Party had not the Power to cross-examine him, and the Rule of the Common Law is strict to this, that no Evidence shall be admitted, but what is or might be under the Examination of both Parties.

Hard. 315.

2 Jon. 164.

Will. Rep. 414.

415.

2 Will. Rep. 563.

L. E. 111. pl. 72.

BUT in such Cases as these, the Way is to move the Court of *Chancery*, that such a Witness's Depositions should be read, and if the Court see Cause, they will order it, and this Order will bind the Parties; to assent to the reading of such Depositions, though it doth not bind the Court of *Nisi Prius*, and this is thought just, because the Witnesses are examined by the Officers of the Court, who are supposed to favour neither Party.

2 Jon. 164.

L. E. 113. pl. 74.

FORMERLY they did not enrol their Bill and Answer, but as it seems, the Bill was left loose in the Office with the Clerks of the Office, and were thereby subject to be lost; and therefore antient Depositions may be given in Evidence without the Bill and Answer.

2 Keb. 31.

L. E. 113. pl. 75.

\* Conditionally.

F

THE

Practice of  
Chan. 7.

THE antient Practice was also, that they never published the Depositions in the Lifetime of the Witnesses, because the Depositions \* *in perpetuam Rei memoriam*, were of no Use till after the Death of the Witnesses; but this Practice was found very inconvenient, because Witnesses became thereby secure in swearing whatsoever they pleased, in as much as they could never be prosecuted for Perjury, the Effect of their Oaths not being known till after their Deaths.

3 Mod. 116, 117.  
Before 54.

ON an Information for Perjury the Depositions in *Chancery* signed by the Commissioners, is not sufficient Evidence without Proof, that the Party swore them; for there is no Proof of the Identity of the Person, but by the Comparison of Hands, which is not a sufficient Evidence in a criminal Case for another Man might personate me, and thereby subject me to the Penalty of Perjury.

Styl. 446.

FROM what has been said, 'tis evident, that a voluntary Affidavit before a Master in *Chancery* is no Evidence between Strangers, because here is no Cross-Examination, since there appears to be no Cause depending, and therefore such Evidence cannot by any Means be admitted.

Atkins 4.

DEPOSITIONS in *Chancery* are not of themselves Records, but they are Oaths in a Court of Record, and therefore it seems a Witness swearing falsely, may be prosecuted either at

\* For the Perpetuity of a Fact.

Common Law, or upon the Statute, because this is Perjury in a Court of Record.

ALSO a Man may be indicted for a false Oath in the Ecclesiastical Court, or in the County Court, at Common Law, but not upon the Statute, for the Statute expressly mentions that it is a Court of Record, in which the Perjury must be committed, to become punishable within that Law; but a Perjury may be punished at Common Law in any Court that hath Authority to examine the Cause in Relation to which the Perjury is committed, for it were preposterous that they should give a Court Authority to examine upon Oath, and not to punish the Violation of that Oath; but it seems if the Court hath no Authority to examine the Cause, then such Perjury cannot be punished, for an Oath taken \* *Coram non Judice*, is no Oath in Law, for the Law cannot take any Notice of an Oath, but where it gives an Authority to give an Oath, for if there be no lawful Power to tender an Oath, 'tis but an insufficient Swearing, for an Oath not taken by lawful Authority, must be an Oath not regarded by the Law, and therefore not punishable, as the lawful Oath is.

DEPOSITIONS taken in the Spiritual Court in a Cause relating to Lands can't be read, because they are no Oaths at all, in as much as the Spiritual Courts have no Authority to take Depositions relating to Lands; but it seems they may be read when taken in a

\* Before one who was no Judge.

2 Sid. 454.  
Hawk. P.C. 173.  
Cro. Eliz. 185,  
609.  
2 Ro. Rep. 410.  
Ro. Abr. 40.  
pl. 12.  
Leon. 131.  
Cont.  
Dy. 243. pl. 53.

Vent. 370.  
Mod. 166.

2 Sid. 454.  
March 120.  
Styl. 10.  
Cro. Jac. 463.  
L.E. 115. pl. 30.



Cause, in which they have Authority, as far as relates to that Cause, in as much as these are lawful Oaths, and a Man may be indicted for the Violation of them, though they be not Oaths in a Court of Record.

Mod. 166.  
Danv. Abr. 45.  
pl. 24.

A MAN assumes, that in Consideration that the Plaintiff would bring two Witnesses to swear to his Debt, before a Justice of Peace, that he would pay it, and says that he did bring two Witnesses, and this Oath, though *extrajudicial*, and though the Justices had no Authority in the Matter, was held a good Consideration, for the Oath tending to a Decision of the Right was not held to be contrary to the Law of God, and therefore the Parties might assume upon that Consideration, but 'tis not such an Oath as the Law takes Notice of to punish as Perjury.

#### Decree. Sentence in the Spiritual Court.

2 Mod. 231.  
2 Str. 960, 961.  
Eq. Abr. 227, &c.  
Ch. Pre. 59, 64,  
116, 212.  
10 Mod. 42, 43,  
44, 74, 108,  
109, 126.  
Vern. 53, 413.  
2 Vern. 471, 591,  
547, 555, 603.  
Fitzgib. 197.  
Ld. Raym. 734.  
893, 936.  
Will. Rep. 414,  
415.  
8 Mod. 75, 181,  
322.

A DECREE in *Chancery* may be given in Evidence, and so may a Sentence in the Ecclesiastical Courts, for their Judgments must be of Authority in those Cases where the Law gives them a Jurisdiction; for it were very absurd that the Law should give them a Jurisdiction, and yet not to suffer what is done by Force of that Jurisdiction, to be a full Proof, for that were to suppose they were incompetent Judges, where they had Jurisdiction.

9 Mod. 66. 11 Mod. 210 to 212. Gilb. Eq. Rep. 2, 203, &c. 12 Mod. 24, 85, 136, 215, 231, 305, 310, 319, 339, 342, 343, 375, 394, 414, 494, 500, 521, 555, 565, 579, 607. Stra. 95, 162, 308. See Barnard. K. B. 243. 2 Stra. 960, 1151, 1242. 2 Rol. Abr. 679. L. E. 125. pl. 101.

EVIDENCE.

ANOTHER Way of perpetuating the Testimony of a Person deceased, I shall here add, and that is by giving the Verdict in Evidence, and the Oath of the Party deceased; where you give in Evidence any Matter sworn at a former Trial, it must be between the same Parties, because otherwise you dispossess your Adversary of the Liberty to Cross-examine; besides otherwise you can't regularly give the Verdict in Evidence, and where you can't give the Verdict in Evidence, you can't give the Oath on which it was founded, for if you can't shew there was such a Cause, you can't shew that any Person was examined in that Cause, and without shewing there was a Cause, no Man's Oath can be given in Evidence, in as much as that appears to be a Voluntary Affidavit.

12 Mod. 318.  
See Stra. 162.  
Barnard. K. B.  
243.

WHAT a Man himself that is living has sworn at one Trial, can never be given in Evidence at another Trial to support him; though what the Witness has said in Discourse, may be given in Evidence, to support him; because the same Oath at another Trial is no Evidence of the Truth of any Man's Swearing; for if a Man be of that ill Mind to swear falsely at one Trial, he may do the same on the other on the same Inducements; but what a Man says in Discourse without Premeditation or Expectation of the Cause in Question, is good Evidence

12 Mod. 318.  
4 St. Tri. 265 to  
272.  
2 Hawk. P. C.  
430. sect. 9, 12.  
2 Keb. 384.

to support him; but if a Man hath sworn at one Trial different from what he hath at another, this is good Evidence as to his Discredit.

2 Sid. 325.  
2 Hawk. P. C.  
430. sect. 8.  
L. E. 31. pl. 66.  
2 Rol. Rep. 460,  
461.  
See 2 Keb. 384.

ON an Appeal of Murder, the Appellant cannot give in Evidence the Indictment, and what a Person deceased swore at the Trial; for in this Case we have already shewn that the Indictment cannot be given in Evidence against the Defendant, and by Consequence, the Oath cannot be given in Evidence on the Indictment; besides the Appeal is tried as a new Cause, and therefore it is necessary to have his Accusers Face to Face.

Sid. 325.  
L. E. 31. pl. 66.

IF the Indictment be given in Evidence for the Prisoner, and the Oath of a Person deceased, the Account of that Oath must be upon Oath, for there is no Reason that the Indictment should be given in Evidence for the Prisoner to prove he was once acquitted of the same Fact, and in Favour of Life none of the Evidence ought to be lost, but then the Account of that Evidence ought to be upon Oath, for nothing can be given in Evidence as an Oath but upon Oath.

Raym. 170.

IN an Information of Perjury on a Trial in Ejectment, on Not guilty, the Defendant insists that what he swore was true, and to prove the Perjury, one was produced to prove what a Person deceased swore at the former Trial in Ejectment; and this was allowed to be good Evidence, because it doth  
not



not go to the Proof of the Change itself, that the Defendant swore, but only to the Falsity of the Fact that was sworn, and they would have it that the Change itself which consists in the Proof and what the Defendant swore, might be directly proved by such Evidence, as are Cross-examined by the Defendant, but the Falsity of the Fact which the Defendant swore to, may be made out by any other Proof, because in this Case you must give the Verdict in Evidence to prove the Perjury, in as much as the Cause in which the Perjury was committed, must be set forth in your Information, and by Consequence be proved on your Issue, and when you have proved that the Defendant swore in the Cause, you may shew the whole Matter, *viz.* how his Testimony stood opposed by the Evidence of the Party deceased.

Of the Proceedings in the Spiritual Court.

THESE Proceedings are in Cases Matrimonial and Testamentary, and all other Ecclesiastical Causes. How these Courts gain'd the Jurisdiction in Causes Testamentary, which was originally of Temporal Conuzance, is not here to be considered further than is necessary to determine the Weight of Credibility that is to be given to their Sentences. The Way of authenticating Testaments by the Civil Law was this: The Testator and his Witnesses subscribed the Will, bound it up and seal'd it with their Seals, which after the Decease of the Testator was open'd

in the Presence of the Prætor, and he delivered Copies of the Will, and kept the Original in a Publick Treasury; and from hence it is, that the Spiritual Court keeps the original Will, and does give out the Probate, which is but a Copy of the Will under their Seals.

BUT originally among the *Germans*, the Goods as well as the Feud itself belong'd to the Lord; afterwards it was thought fit that the Feudary should dispose of them, and then the Will was proved in the Country Courts before the Alderman and Bishop, and if any Man died intestate, they were distributed among his Kindred; but after the Conquest, the Probate of the Will and the Commission of Administration was indulged to the Bishop, who never had it in the Times of the Empire, under Pretence, that the Provision would be better made for the Souls of the Deceased, but if they had exceeded their Commission, they had plainly no Authority, and therefore they must confine themselves to the Bequest of the personal Estate, for the Feud was not Devisable until the 32 *H. 8.* for Reasons mentioned in another Place.

### W I L L S.

*Rel. Abr. 678.*

THEREFORE if a Man devise Lands by Force of the Stat. of Wills, or by Custom, the Probate of the Will in the Spiritual Court cannot be given in Evidence, for all their Pro-

Proceedings, so far as they relate to Lands, are plainly \* *Coram non Judice*, for they have no Power to authenticate any such Devise, and therefore a Copy produced under their Seals, is no Evidence of a True Copy.

BUT the Probate of the Will is good Evidence as to the personal Estate, and they are the Records of that Court, and therefore a Copy of them under the Seal of that Court must be good Evidence; and this is still the more reasonable because 'tis the Use of the Court to preserve the Original Will, and only to give back to the Party the Copy of that Will under the Seal of that Court. Rol. Abr. 672.

WHERE a Person in Ejectment would prove the Relation of Father and Son by his Father's Will, he must have the Original Will, and not the Probate only, for where the Original is in Being, the Copy is no Evidence, and the Probate is no more than a true Copy under the Seal of the Court of a private Instrument, and the Law which seeks the best Evidence, will not allow of the Copy only; besides this is not proved to be a true Copy, for the Seal doth not prove the Truth of the Copy, unless the Suit related to the personal Estate only. Polhill and Polhill, Hil. 1701.

BUT the Leidger Book is Evidence in such a Case, because these are not considered meerly as Copies, but they are the Rolls of the Court itself, and though the Law doth not allow these Rolls to prove a Devise of Polhill and Polhill, Hil. Aff. 1701.

\* *Before no Judge.*



Lands where the Claim is by the Words of the Devise, for the Reasons already given, yet when the Will is only to prove a Relation, the Rolls of the Spiritual Court, that have Authority to enroll all Wills, are sufficient Proofs of such Testament, for if there be such a Testament as appears by the Rolls of that Court, the Relation is proved, for that there is such a Will doth not appear by the Copy of the Will, in as much as the Copy is not good Evidence of an Original, because the Law admits nothing to be read that implies better Evidence.

BUT the Copy of the Leidger Book was not allowed to be read in this Case, because common Practice had prevail'd that it should not; though my Lord *Holt* said that since the Original would have been read as a Roll of the Court without further Attestation, 'twas fit the Copies should be read, and that the Practice should be altered; the Practice seems to be founded on the Mistake, that the Leidger Book is read as a Copy, and so the Copy of that is but the Copy of a Copy, whereas the Leidger Book is read as a Roll of the Prerogative Court.

Raym. 404 to  
406.  
2 Sid. 359.  
Lev. 235.  
2 Keb. 337, 343,  
641.  
Comyns 150.  
Anon.  
Ld. Raym. 262.  
Stra. 481.  
Will. Rep. 388.  
L.E. 125. pl. 103.

IN a Suit relating to a personal Estate, the Probate of the Will under the Seal of the Court is sufficient Evidence, and no Evidence contrary to it can be given, that such Will was not the last Will and Testament of the Party deceased, for the Spiritual Court are the proper Judges of what is, and what

is

is not the Will of the Testator, and since the Authority of judging is committed to them, the Temporal Courts are bound by their Judgments.

BUT the adverse Party may give in Evidence, that the Probate is forged, because such Evidence supposeth that the Spiritual Court hath given no Judgment, and so there is no Reason for the Temporal Court to be concluded, since the Spiritual Court hath made no Judgment in this Matter, for a forged Probate is none at all.

Raym. 404 to  
406.  
2 Sid. 359.

So they may also give in Evidence, that such Probate was obtained by Surprise, for that is as much as to say, that the Spiritual Court hath made no legal Decision in the Matter, and therefore that the Temporal Court ought not to be concluded by their Authority.

Raym. 404 to  
406.  
2 Sid. 359.

So if Letters of Administration be shewed under Seal, you may give in Evidence, that they were revoked; for this is in Affirmance of the Proceedings in the Spiritual Court, and doth not at all controvert the Righteousness of their Decisions.

2 Sid. 359.

A WILL that hath partly the Form of a Will, and partly the Form of a Deed, may be given in Evidence as a Will, for if the Intent of the Party shall sufficiently appear to make a Disposition after his Decease, the Information of the Words shall not vitiate it.

Mod. 117.  
Vent. 257.  
3 Keb. 310.  
See 2 Danv. Abr.  
539.  
L. E. 89. pl. 18.

WHERE

Keb. 40, 117.  
See L. E. 276.  
pl. 106.

WHERE a Will remains in *Chancery*, by Order of that Court, a Copy may be given in Evidence, for then it becomes a Roll of that Court, and by Consequence a Copy of it sufficient Evidence. See more of Wills after.

Of the Publick Matters that are not Records.

THE Rolls of the Court Baron or the Copies of them, for they are Courts of Justice, though they are not of Record.

Hill. Ass. 1701.

THE Court Rolls are Evidence, or the Copies of them, for they are the Publick Rolls, by which the Inheritance of every Tenant is preserved, and they are the Rolls of the Manor Court, which was antiently a Court of Justice relating to all Property within the District.

Ibid. 1700.  
Sid. 71.  
Godol. 145.  
Noy 146.  
Brownl. 207.  
2 Ro. Abr. 115.  
pl. 11.  
Cro. Eliz. 411.  
Moor 451.  
Salk. 281.  
12 Mod. 86.  
L. E. 81. pl. 2.

THE Register is good Evidence, or a Copy of it; the Register began in the 30 of *H. 8.* by the Instigation of the Lord *Cromwell*, who at that Time was vested with all the Authority that the Popes Legates formerly had, under the Title of Vicar General to the King, and all Wills that were above the Value of two hundred Pounds, were to be proved in this Court; and therefore it served his Purpose to set on Foot a Registry of all Persons that were christened and buried, and this might be very well appointed by the King's Authority, as supreme Head of the Church, since

Christen-



Christening and Burying are Ecclesiastical Acts; and when a Book was appointed by publick Authority, it must be a publick Evidence; this was afterwards confirmed by the Godol. 164. Injunction of *Edward VI.* and the particular Manner of Registering appointed, as that the Registering should be in the Presence of the Parson and Churchwardens on *Sunday*, and 2 Str. 1073. that the Book should be kept lock'd in the Church, to which the Vicar and Churchwardens are to have Keys.

AN Indictment for entring a false Marriage 2 Sid. 71, 72. in the Register Book, and the Defendant fined two hundred Marks; for since the Register is publick Evidence, it must be guarded by the Law, that it be not counterfeited\*.

THE Pope's Licence without the King's Palm. 427. See L. E. 6. pl. 20. has been held good Evidence of an Impropriation, because antiently the Pope was held to be Supreme Head of the Church, and therefore the Pope was held to have a Disposition of all Spiritual Benefices with the Concurrence of the Patron, without any Leave of the Prince of the Country, and these antient Matters must be admitted according to the Error of the Times in which they were transacted. A Pope's Bull is no Evidence on a Palm. 38. General Prescription to be discharged of Tithes, because that shews the Commencement of such a Custom, and a General Prescription shews that there was no Time or Me-

\* By Stat. 26 Geo. 2. c. 33. sect. 16. the above Offence of entring a false Marriage in the Register Book, and several others relating thereto, therein particularly mentioned, are made Felony without Benefit of Clergy.

mory of Things to the contrary, so that the Bull doth itself contradict such Prescription.

Palm. 38.

BUT the Pope's Bull was Evidence on a Spiritual Prescription, when you only lay the Lands belonged to such a Monastery as was discharged of Tithe at the Time of the Dissolution, for then they continue discharged by Act of Parliament.

Hob. 188.  
Tri. per Pais 342.

IF the Question be, whether a certain Manor be Antient Demesne or not, the Trial shall be by *Domes-Day Book*, which shall be inspected by the Court. Antient Demesnes are the Socage Tenures that were in the Hands of *Edward* the Confessor, and which *William* the Conqueror in Honour of him endow'd with several Privileges: *Domes-Day Book* was a Terrier or Survey of the King's Lands, which was made in the Time of the Conqueror, and which ascertains the particular Manors which had this Privilege.

Term. Pasch.  
1701.  
in Scaccario.

TO know whether any Thing be done in or out of the Ports, there lies in the *Exchequer* a particular Survey of the King's Ports, which ascertains their Extent.

AN old Terrier or Survey of a Manor, whether Ecclesiastical or Temporal, may be given in Evidence, for there can be no other way of ascertaining old Tenures or Boundaries.

Yates and Harris,  
Hil. Ass. 1702.

AN old Map of Lands allow'd Evidence, where it came along with the Writings and agreed

agreed with the Boundaries adjusted in an antient Purchase.

IF Copyhold Rolls make mention of a Surrender to the Use of the Tenant's last Will, and then admit *A.* as Devisee to the Will, this was ruled to be no Evidence of the Seisin or Title of *A.* without the Will itself, because the Land doth not pass by the Surrender, without the Will itself, and therefore the Will must be shewn as the best Evidence of *A.*'s Possession and Title.

a Jenkins and Baker, per Tracy, 1705.

D E E D S.

WE come now in the second Place, to that which is only private Evidence between Party and Party, and that is also Two-fold, either Deeds, or other Matters of an inferior Nature.

1st, OF Deeds; and here the General Rule is, that where any Person claims by a Deed in the Pleadings, there he ought to make a Profer of it to the Court, and where he would prove any Fact in Issue by a Deed, in both Cases the Deeds themselves must be shewn.

The Deed consists of three Things.

1st, OF Sealing by the Parties.

2dly, OF Delivery to the Party to whom the Deed is made.

3dly, OF a Right transferred, or Obligation created.

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1st, THE



1st, THE Seal was very antient in the *Roman* and *Grecian* Governments, and from them it came to the Northern Nations, who antiently passed all Manner of Right, by the actual Tradition of the Thing itself; the Seal followed from the Invention of Coins, and is a Derivation from the same Convenience; for as Coins were invented as Tickets, to facilitate the Exchange of all Manner of Commodities, so when Coin was wanting, or not ready for Payment, Tickets were given by Impression in Wax, and these pass'd instead of the Coin itself, and these Impressions were made with great Distinction, for they contained the Arms or some notorious Symbol of the Person contracting; now when such Distinctions were taken up and found of Use, they were at last required in the authenticating of all Manner of written Contracts, and from hence the Law grew, that there could be no solemn Contract without the Distinction of the Seal.

2dly, THE Delivery was always a solemn Sign used by the Northern Nations, in transferring of Right, and as they antiently delivered the Thing itself, and by that Delivery made the Alienation; so when Contracts took the Place of the Things themselves that were to be delivered, they annexed the Solemnity to the Contract, and the Contract was compleated by the Delivery, and from thence it became necessary that a Delivery should be made of all Contracts.

3dly, IN

3dly, In every Contract there must be some Right transferred, or Obligation created, and therefore there must be apt Words to shew what Right was transferred, and to whom, to shew what Obligation was created, and to whom, and the Sense and Signification of the Words must be expounded by the Law, since it is the Province of the Law, to determine the Forms and Solemnities, and Operation of all Manner of Contracts; for the Operation and Effect of a Contract, can't be determin'd but by the Rules of Law, that are appointed as the Measures of transferring Right, and of creating Obligations; and without such stated Rules in every Society, no Man could be certain of any Property, for then the Sense of the Contract must be at the Mercy of the Judge or Jury, who might construe or refine upon it at Pleasure.

THERE must therefore be a Profert made of all solemn Contracts in any Action founded on such Contracts.

1st, FOR the Security of the Subject, that what Right is transferred, or what Obligation is created, might be judged of according to the Rules of Law.

2dly, BECAUSE all Allegations in a Court of Justice, must set forth the Thing demanded; now the Thing demanded can't be set forth without the Instrument shewn,

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upon

upon which the Demand arises, for since the Demand is by the Instrument, there can be no Demand at all without shewing that from which it arises.

Profert of Deeds.

Co. Lit. 226.

THEREFORE Parties to a Deed, can't found any Claim without shewing a Deed to the Court.

Ibid. 267.  
10 Co. 92.

NOR can Privies in Estate take any Advantage of a Deed without shewing it.

Ibid. 93.

As if there be Tenant for Life, Remainder in Fee, and there be a Release to him in Remainder, Tenant for Life cannot take Advantage of it without shewing the Deed, for since the Right pass'd meerly by the Deed, to say any Person released without Deed, will not be a good Plea.

6 Co. 38. a.

WHEN a Man shews a Title in himself, every Thing collateral to that Title shall be intended whether it be shewn or not, for tho' the Law requires an Exactness in the Derivation of the Title, yet when that Title is shewn, the Law will presume all Collateral Circumstances in Favour of Right; for when lawful Conveyances, which are made with Care, and on Consideration, do appear, it would create too great Nicety to require an Exactness in the shewing of every Collateral Matter, and would tend to the intangling of Right with too many Difficulties, and therefore



fore by the Benignity of Justice, they shall be intended: Besides a Matter collateral to a Title, is what doth not enter into the Essence or Being of a Title, but arises \* *Aliundé* so that there must be a good Derivation of your Right without it.

As when a Man declares of a Grant or Feoffment of a Manor, the Attornment shall be intended; for when a Title is shewn to the Manor, Attornment of the Tenant which is collateral to that Title, shall be intended till the contrary is shewn on the other Side †.

So in Trespass, the Defendant conveys the House in which, &c. by Feoffment from J. S. and justifies Damage Feasant; the Plaintiff replies, that J. S. before the Feoffment, made a Lease to J. N. who assigned to him; the Defendant rejoins, that the Lease was made on Condition, that if J. N. assigned over without Licence, by Deed from J. S. that then J. S. should re-enter; the Plaintiff surrejoins, that J. S. did give Licence by Deed, without any Profert of the Deed, and yet this Surrejoinder was good, because the Plaintiff's Title was by Assignment of the Lease from J. N. and consequently the Licence from J. S. is but a Matter collateral to the Assignment, and by Consequence the Deed must be intended to be well and legally made, tho' it be not shewn to the Court.

\* *Elsewhere.* † See 4 An. c. 16. sect. 9. whereby all Attornments of Tenants are taken away.

6 Co. 38.

BUT if the Matter be collateral to the Plaintiff's Title, then there is another Difference, and that is where the Deed is necessary \* *ex provisione hominis*, and where tis necessary † *ex Institutione Legis*, for where the Deed is necessary † *ex Institutione Legis*, there you must shew it, for 'tis repugnant that the Law should require a Deed, and not put you to shew that Deed when 'tis made; as if you are obliged to shew the Attornment of a Corporation, there you must shew a Deed, in as much as corporeal Bodies, by the Rules of the Law, can't act but by corporeal Instruments; for the Body consists in Agreement and Union, by Creation of Law by Patents or Instruments under Seal, and there is no Act of the Aggregate Body, but in the same Manner, so that there can be no Attornment without a Deed, and the Law cannot allow the Attornment of such a Body without it, therefore no Attornment is shewn unless a Deed is shewn also.

Ibid.

BUT when a Deed is necessary \* *ex provisione hominis*, there when it is collateral, as in Case of the Licence before-mentioned, it need not be shewn, for the Private Act of the Parties shall not controul the Judgment of the Law, that intends all such collateral Matters without shewing.

THERE is a Difference to be taken between Things that lie in Livery, and Things that lie

\* By the Provision of Man. † By the Institution of the Law.

in

in Grant, for Things that lie in Livery may be pleaded without Deed, but for a Thing that lies in Grant, regularly a Deed must be shewn.

Ist, Of Things in Livery, 'tis to be known that Livery was the antient Conveyance, which was a solemn Delivery of Land in Right of the Inhabitants; and because this was done \**Coram paribus Curie*, and the Tenant ever after resided in the Possession, it was reckoned the most notorious Way of Conveyance; and since this was the antient *Gothick* Way, and because they reckoned it of itself most manifest, the Solemnities of a Deed were not necessary.

AND therefore a Man may plead that *J. S.* <sup>2 Rol. Abr. 682.</sup> infeoff'd him without saying †*per Indenturam*, and yet give the Indenture in Evidence, because the Indenture is not the Feoffment, but the Feoffment is made by the Livery, and by that only the Party is invested with the Feud, and the Indenture is only Evidence of such Feoffment.

BUT if a Man pleads, that *J. S.* hath in-<sup>Ibid.</sup> feoffed him § *per Fait*, whether a Man may give a parol Feoffment in Evidence, hath been reasonably doubted, because he has bound himself up to a Feoffment by Deed, and if the Jury have only Evidence of a parol Feoffment, and yet find the Issue that the Deed may be used by Way of Estoppel ever after, where in Truth there was no such Deed.

\* Before Equals of the Court. † By Indenture. § By Deed.



2 Rol. Abr. 682, So a Demise may be made without Deed, as well as a Feoffment, for here the Party resides in the Possession, and therefore the old Way of Contracting governs in this Case; and so a Man may plead a Demise without Deed, and give the Indenture in Evidence, for the Indenture may be used as an Evidence of the Contract that would be good, whether there were any Indenture or not; but if the Demise were laid by Indenture, it seems that they could not give a parol Demise in Evidence.

Co. Lit. 357.

LIVERY also is an Estoppel, and is by Coke called an *Estoppel \* in Pais*, because 'tis a Fact a Man can't impeach or deny, and this is from the Notoriety of the Ceremony, for when Solemnities are settled for transferring a Possession, they ought to be held as sacred by the Law, and therefore a Man is concluded from destroying that of which he himself is the Author, or from impeaching that which is held as sacred to transfer all Possessions,

Ibid. 225.  
Lit. §. 365.

THEREFORE if the Defendant pleads the Livery and Seisin of the Plaintiff, the Plaintiff can't reply that the Livery was Conditional, without shewing the Deed, in as much as the Plaintiff is estopped to defeat his own Livery by a naked Averment and parol Evidence only.

\* *In Fact.*

BUT

BUT the Jury are not estopped on the General Issue, from finding such a Conditional Feoffment, for the Jury are Men of the Neighbourhood that are supposed to be present at the Solemnity, and they are sworn \* *ad Veritatem dicendam*, and therefore they can't be estopped from finding the Truth of the Matter, and by Consequence may exhibit the Condition on the Feoffment.

Co. Lit. 226.  
Lit. §. 366.

BUT since the Use of the Solemnities before the Men of the Country hath ceased, by allowing secret Liveries, only in the Presence of two Witnesses, therefore the Statute of Frauds and Perjuries hath enacted, that no Leases, Estates or Interests of Freehold, or for a Term of Years, or uncertain Interest (not being Copyhold) shall be assigned, granted, or surrendered, unless it be by Deed or Note in Writing, under the Hand of the Party or his Agent thereunto lawfully authorized in Writing, or by Act and Operation of Law, so that by this Statute the Ceremony of Livery only is not sufficient to pass Estates of Freehold or Terms for Years; but 'tis not necessary to set forth such Contract on the Pleadings, for they are as they were formerly, † *Feoffavit et Demisit*.

Buck's Case  
Trin. 1701.

A Man may plead a Condition to determine an Estate for Years, without Deed; for this begins without any Livery, and therefore the Party is not estopped by any

Co. Lit. 225.  
Lit. §. 365.

\* To speak the Truth. † Infeoffed and demised.

notorious Ceremony from averring the Condition.

BUT where a Man sets out a Feoffment, the other Party may reply, that it was by Deed, and shew the Condition, for then there is an Estoppel; and so the Matter is in equal Balance, and therefore must be determined according to Truth.

2dly, OF Things lying in Grant, and these are all Rights, as Fairs, Markets, Advowsons, and Rights to Lands, where the Owner is out of Possession; and these being Rights, they can't possibly pass by Investiture of the Possession, because they can't possibly be delivered over nor possess'd, and therefore they must pass by the next Sort of Grants that holds the Second Place, in Point of Solemnity, and that is by Grant under the Hand and Seal of the Party.

NOW a Person that claims any Thing lying in Grant, must shew his Deed from the Party that had the Original Grant, or otherwise he must prescribe in the Thing he pretends to, and the Prescription being supposed immemorial supplies the Place of the Grant.

10 Co. 93.

HE also that has a particular Estate, by the Agreement of the Parties, must shew not only his own Conveyance, but the Deeds Paramount, for there can be no Title made to a Thing in Agreement, but by shewing  
ing



ing such Agreement, and the particular Tenant ought to covenant to have the Power of the Deeds, in as much as he has no Title, unless he can derive the Estate that arises in Agreement, up to the first Original Grant.

BUT where any Person claims any Estate, <sup>10 Co. 93. 94.</sup> by particular Act in Law, there they may make their Claims without shewing the Deeds, as Tenant in Dower, or by Elegit, or the Guardian in Chivalry, may claim an Estate in a Thing lying in Grant without the Deed; for when the Law creates an Estate, and yet doth not give the particular Tenant the Property of the Deeds, it must be allow'd that the Estate be defended without them, otherwise the Creation of the Estate were altogether in vain.

So they may plead a Condition without <sup>Co. Lit. 225.</sup> shewing the Deeds, because they claim an Estate by the Act of the Law, and therefore are not estopped by the Livery; so that they may claim an Estate defeated by the Condition without a Deed, also they are not supposed to have the Deeds and Muniments of the Estate, and therefore for the Reason formerly given, may do it without Deed.

NOTE 10 Co. 94. does not warrant this Distinction, between Tenant in Dower, and Tenant by the Curtesy generally, but only in the Case of a Release made to the Wife.

10 Co. 94.  
Co. Lit. 226, a.

BUT Tenant by the Curtesy, can't claim any Estate lying in Grant, without Deed, because he has the Property in, and Custody of the Deeds, in Right of his Wife, and that Property can't be devested out of him, during the Continuance of his Estate.

*Ibid.*

So also he can't defeat an Estate of Freehold, without shewing the Deed, nor can the Lord by Escheat do it without shewing the Deed, for the Act of Livery is an Estoppel that runs with the Land, and bars all Persons to claim it, by Virtue of any Condition without the Condition appears in a Deed, for the Notoriety and Solemnity of the Act, is that which makes it obligatory to all Persons, so that they cannot impeach it, without shewing a precedent Title, for that Livery cannot be defeated, but by shewing something equally notorious, and since in both these Cases the Custody of the Deeds resides with them, they must shew the Condition.

Co. Lit. 267.  
10 Co. 94. b.

So that the General Rule is, where any Person ought to have the Custody of the Deeds, there where such Person is compelled to shew his Title, he ought to make a Profer of those Deeds to the Court, for every Man ought to keep his Deeds, and can't take Advantage of his own Negligence in losing them; therefore in the Case formerly put, of Tenant for Life, the Remainder in Fee, and a Release is made to him in Remainder

mainder, in such Case Tenant for Life ought to make a Profert of the Deed, for in this Case they have both Parts of the same Feud, and therefore Tenant for Life is supposed to be equally intitled to the Deeds, as he in Remainder.

BUT where a Person is an utter Stranger to any Deed, there in Pleading he is not compelled to shew it, for where he is not supposed by the Law to have the Custody of the Deeds, there he cannot be compelled in Pleading to shew such Deeds to the Court, for that were to compel the Party to Impossibilities, which were a very unjust and unequitable Law.

Co. Lit. 226.  
Styl. Regr. 205.

As if a Man mortgageth his Land, and the Mortgagee leaseth the Land for Years, reserving a Rent, and then the Condition is performed, the Mortgagor re-enters; the Lessee in Bar of an Action of Debt shall plead the Condition and Re-entry, without shewing the Deed, for the Lessee was never nor could be intitled to the Custody of the Deed, and therefore it were altogether unjust to compel him to produce it.

Co. Lit. 226. a.

So if a Man bring a \* *Præcipe* against A. he shall plead that he was only a Mortgagee, and that the Mortgage was perform'd, so that he hath no longer Seisin of the Estate, and this without shewing the Deed; for upon Performance of the Condition, the Pro-

Co. Lit. 226.

\* *Præcept.*

perty



perty of the Deed was no longer in the Mortgagee, but it ought to be re-bail'd to the Mortgagor, and having no longer any Title to the Deed, he may plead the Condition, without shewing it.

20 Co. 94.

So in an Action of Waste, or in Discharge of the Arrears of Rent, the Tenant pleads a Grant of the Reversion and Attornment, after such Waste committed, or such Arrear due, the Tenant can't shew the Grant, \* *Causa qua supra.*

5 Co. 74. b.

A DEED enroll'd, must be offer'd to the Court in Pleading, though the Deed be enroll'd in the same Court in which the Plea is depending, for this is no Record but a Deed recorded; for a Record must be the Act of the Court, and therefore the Decisions of Justice by the Court, that lye as Precedents for future Observation, are the Record of the Court, and Letters Patent, which are the King's Acts, are the highest Sort of Records; but a Deed enroll'd, is only a private Act of the Party authenticated in Court; and from thence, this Difference is drawn, that Letters Patent enroll'd in the same Court, or Records of the same Court, need not be profer'd to the Court, but a Deed enroll'd must; for all Records that are publick Acts, and that lye for the Direction of the Court, in Matters of Judicature, must be taken Notice of, and therefore they need but refer to it with a † *Prout patet per Recordum*, for the Court

\* *For the Reason above.*

† *As it appears by Record.*

will

will take Notice of the Course and Orders of Court, upon Reference to them; but Deeds are no more than the private Act of the Parties authenticated by the Court, and they don't lye for the Direction of the Court, but take hold of the Authority of it to give them Credit; and therefore the Court doth not take Notice of them, unless they be pleaded; but the Letters Patent of another Court the Court doth not take Notice of, unless they be offered, for since they are none of the Records that are directory to this Court of Justice, 'tis not the Office of the Court to take Notice of them, and therefore 'tis their Duty to offer them as they do all other Allegations.

10 Co. 92.  
Stra. 520.

To a Deed acknowledged in Court, a Man can't plead \* *Non est Factum*, for being done in the Court, the Truth of the Fact is so far to be credited, that he shall never deny the Deed, but he may avoid the Operation of the Deed by pleading † *Reins passa per le Fait*, for that doth not impeach the Credit of the Court, in which it was acknowledged.

SINCE the Term, to avoid the entering up the several Continuances of Business, is reckon'd as one continued Law Day, therefore Deeds pleaded shall be in the Custody of the Law during the whole Term, being the Day wherein they are pleaded, and being then before the Court, any Body may take Advantage of them; but since they belong to the Custody of the Party, if the

5 Co. 74. 75.

\* *It is not his Deed.* † *That nothing passed by the Deed.*

Deed be not denied, it shall go back to the Party, after the Term is over, and then no Body can take Advantage of it, without a new Profert; for then it is not before the Court; and therefore the Plaintiff in the *King's Bench* may take the Advantage of a Condition in a Deed in his Replication, because it was \* *et prædictus A. dicit*, as of the same Term, but he cannot take Advantage of a Replication of a Deed in the *Common Pleas*, because they enter an *Imparlance* to another Term; but where the Deed comes in, and is denied, it remains in Court for ever, because that is the only Point in Debate, on which the Decision of the Court is founded, and therefore like all other Decisions, it must remain among the other Records of the Court; and because 'tis tied up to this Court, and is impossible to be removed, it shall be pleaded in another Court without shewing.

Co. Lit. 226.  
2 Stra. 1186,  
1198.

As no Party shall take Advantage of his own Negligence, in not keeping of his Deeds, which in all Cases ought to be fairly produced to the Court; so his Adversary shall not take any Advantage in his violent detaining of them; for the one by a violent taking away of the Deeds, gives a just Excuse to the other, for not having them at Command, and no Man can ever make any Advantage of his own Injury; and therefore 'tis a good Plea for one Party to say, that the other entered, and took away the Chest wherein the Deeds were.

\* *And the aforesaid A. says.*

IN



IN an Action of Debt upon a Bond, it is <sup>Cro. Jac. 32.</sup> Matter of Substance to make a Profert of the Deed, because this is the Contract on which the Court ought to found their Judgment, and therefore it ought to be exhibited to the Court.

'Tis not Matter of Substance, to shew <sup>2 Saund. 402.</sup> Letters of Administration, for whether they <sup>3 Keb. 61.</sup> are legally granted or not, belongs to the Conuzance of the Spiritual Courts, who are governed by the Rules of the Civil Law, and therefore their Legality cannot be weighed at common Law, since it has different Measures of Judicature. <sup>2 Stra. 1261.</sup>

Evidence of Deeds.

SECONDLY, of giving Deeds in Evidence <sup>10 Co. 92. b. 93.</sup> to the Jury, and here the General Rule is, that where any Thing is to be proved, the Deed itself must be given in Evidence, and not the Copy of it; and the Deed must be regularly proved by one Witness at least.

THIS is now to be understood where the Deed is of a late Date, for if the Deed be of thirty Years standing, which now makes an antient Deed, and the Person to whom the Deed was made or those deriving under him, have been in Possession under the Deed, such antient Deed shall be read, without Proof, though the Witnesses to it be alive; and this the Lord Chief Baron *Gilbert* declared

<sup>Mich. 1718.</sup>  
<sup>in the Exch.</sup>  
<sup>per Curiam.</sup>

red to be the Rule of Evidence at *Nisi prius*, and if the Person to whom the Deed was made, hath been in Possession of the Lands contain'd in the Deed, such Possession shall be presumed to be under the antient Deed, unless the contrary be proved.

FIRST, The Deed ought to be given in Evidence, and not the Copy only, for tho' in Records, the Copy was admitted in Evidence, yet the Law will not regularly allow it in private Deeds, for they are not within the same Reason as Copies of Records, for a Record is fix'd in a certain Place, and therefore the Original cannot be had, and by Consequence, the Copy is the best Evidence.

BUT Deeds are only private Evidences, and not fixed or confined to a certain Place, but are lodged in the Custody of the Party, and not of the Law, and therefore they must be produced in Evidence; for the Law requires the best Evidence that the Nature of the Thing is capable of, and the Deed is much better Evidence than the Copy of it, for the Rasure and Interlineation that might vacate the Deed, might appear in the Deed itself, and the very offering a Copy carries a Presumption, as if the Original were defective, and therefore the Copy is not to be admitted; besides, since the Deeds are in the Custody of the Party, the Deeds themselves must be produced, for a Man can't make his own Fault in losing of the Deeds, any Part of his Excuse.

But

But there are some Exceptions out of this General Rule.

1st, AND that is where they prove the Deeds themselves to be burned with Fire, for the Proof of this Matter will excuse the Deed from being produced to the Jury, but notwithstanding a Profert is necessary to the Court, for there is that Conveniency in keeping to known Rules, that they can't be broken, though they tend to the Mischief of particular Persons; and there can't be a more convenient Rule, than that the Cause of every Complaint ought to be shewed to the Court, but the Jury must go according to the Evidence of the Fact.

10 Co. 92. b. 93.  
Mod. 4, 94, 114,  
266.  
L. E. 99. pl. 31.

Now to prove the Import of the Deed, that it was in such an House, and that the House was burned, is the best Evidence that can be had of such Deed, and gives reasonable Grounds for the Jury to find it.

2dly, A COPY of a Deed is good Evidence, where the Deed is in the Defendant's Hands, and he will not produce it; for when the Original is in the Defendant's Hands, the Copy is the best Evidence, for the Presumption that opposes the Copy is, because the Original Deed is, or ought to be in the Party's Hands that would produce the Copy; now that Presumption is destroyed where the Plaintiff proves the Deed itself to be in the Hands of the Defendant, for then it cannot

Mod. 266.

H

be



be presumed, that there was any better Evidence, or that there was any Interlineation, that obliged the Plaintiff to cover it, for if the Copy were not perfect and exact, it would be overthrown by the Defendant's producing the Original.

See Mod. 4, 94,

114, 266.

2 Keb. 31, 546.

3 Keb. 1, 2, 477.

5 Mod. 211, 386.

6 Mod. 225, 248.

10 Co. 92. b. 93.

2 Vern. 471,

591, 603.

Eq. Abr. 228.

Stra. 401, 526.

BUT the Copy of a Deed must be proved by a Witness that compared it with the Original, for there is no Proof of the Truth of the Copy, or that it hath any Relation to the Deed, unless there be some Body to prove its Comparison with the Original.

See L. E. 104. pl. 51.

Vaugh. 77.

WHERE the Effect or Contents of a Deed are proved, and where the Deed is afterwards given in Evidence, and they disagree, there the Deed itself shall control the other Evidence. So it is where the Jury on a Special Verdict, do collect the Contents of a Deed, and yet afterwards do find the Deed \* *in hæc Verba*, the Court there is not to regard the Collection they have made of the Substance of the Deed, but the Deed itself, for that Collection derives its Authority from the Deed, and therefore must of itself fall and come to nothing, when it is opposite to the Deed of which it is a Collection.

WHERE the Possession has gone along with any Deed for many Years, there a very old Copy of the Deed may be given in Evidence, with Proof also that the Original is

\* Word for Word.

lost; and that is according to the Rule of the Civil Law, \* *Si Vetustate Temporis et Judiciaria Cognitione sint Roborate*, for Possession could not be supposed to go along in the same Manner, unless there had been originally such a Deed, and so executed as the Copy mentions, and the Copy can't be supposed to be only offered in Evidence, to avoid Sight of the Original, since it is so antient, that the Antiquity alone prevents all Suspicion of its being counterfeit, and the Antiquity is known from the Antientness of the Possession. But,

Qu. WHETHER such a Copy shall be required without the Proof of its being a true Copy, by Comparison with the Deed itself.

4thly, THE Inspection of a Deed inroll'd, shall be given in Evidence, where the Deed needs Enrollment, there the Enrollment is the Sign of the lawful Execution of such Deed, and the Officer appointed to authenticate such Deeds by Enrollment, is also empowered to take Care of the Fairness and Legality of such Deeds, and therefore a Copy of such Enrollment must be sufficient; for when the Law hath appointed them to be made publick Acts, the Copy of such publick Acts shall be like all other Publick Acts a sufficient Attestation.

5 Co. 54.  
Style 445.  
Keb. 117.  
Tri. per Pais 353.  
Salk. 280.

5thly, THE Recital of one Deed, in another, is no Evidence of the Deed recited,

\* If they be corroborated by Length of Time and judiciary Cognizance.

tho' the Deed containing the Recital be well proved, because there still wants an Attestation of the first Deed; but if the Person objecting to the Evidence of the recited Deed, claims under the Person who executed the Deed that recites the former Deed, the Reciting Deed is Evidence against him, of the Reality of the Recited Deed, because he that claims under me, stands in my Place, and therefore what is Evidence against me, must be Evidence against him.

Mich. 1718.  
in the Exche-  
quer, per Gilbert  
Ch. Baron.

THUS in the Case of *Fitz-Gerald* and *Eustace*; *Eustace* the Plaintiff claimed in Equity, a Debt on the Defendant's Estate, by Virtue of a Power, reserved in the Grandfather's Settlement on the Defendant's Father, to charge the Estate for Payment of Debts, and younger Children's Portions; there Defendant objected that there were not proper Parties, because the Grandfather had made a Mortgage, pursuant to that Power, to one *Cox* who was not Party to the Bill, and did not produce the Original Mortgage, but only an Assignment thereof to *Wybrants*, to which the Grandfather was Party, yet the Court allow'd it to be Evidence of the Original Mortgage, because the Plaintiffs claim'd under the Grandfather who was Party to the Assignment.

5 Co. 54.  
Style 445.  
Keb. 117.  
Tri. per Pais 355.  
Salk. 280.

BUT where a Deed needs no Enrollment, there tho' it be enroll'd, the *Inspeximus* of such Enrollment is no Evidence, because since the Officer hath no Authority to enrol them,



them, such Enrollment cannot make them Publick Acts, and consequently cannot intitle the Copy of them to be given in Evidence, because such Practices may be improved to very ill Purposes; for then if the Deed were doubtful, it were but to enrol it, and bring the Copy or Inspection of it in Evidence, and thereby avoid the giving in Evidence, a Deed that was any Way suspicious.

BUT the *Inspeximus* on an antient Deed, Sty Jr 445. may be given in Evidence, tho' the Deeds need no Enrollment, for an antient Deed may be easily supposed to be worn out or lost, and the offering the *Inspeximus* in Evidence, induces no Suspicion that the Deed is doubtful, for it hath a Sanction from Antiquity, and if it had been ill executed, it must be supposed to be detected when it was newly made.

2dly, As to the second Part of the Rule, the Deed must be proved to the Jury by one Witness at least, for tho' the Deed be produced under Hand and Seal, and the Hand of the Party that executes the Deed be proved, yet this is no full Proof of the Deed, for the Delivery is necessary to the Effence of the Deed, and the Deed takes Effect from the Delivery, so that unless the Delivery be proved, there is no perfect Proof of the Deed, and there is no Proof of the Delivery but by a Witness who saw the Delivery.

But to this Rule there are several Exceptions.

Trin. Ass. in  
Kent 1700.  
Tri. per Pais  
339, 346.  
L.E. 101. pl. 40.  
Sid. 146.  
Co. Lit. 6. b.  
Keb. 877.  
2 Keb. 826.  
Skin. 239.  
2 Mod. 320,  
323.  
3 Salk. 154.  
Sec Lev. 25.

FIRST, if the Deed be forty Years old, that Deed may be given in Evidence, without any Proof of the Execution of it, for the Witnesses cannot be supposed to live above forty Years, and forty Years is Proof sufficient of a Prescription; for the Age of a Man is no more than sixty Years, and a Man is supposed to be twenty Years before he is of Age sufficient to understand the Nature of Right and Wrong, and the General Forms of Contracting; so that after forty Years, the Witness must be supposed to be dead, and therefore since no Person living can be supposed to be Coeval with such Deeds, therefore they may be offered in Evidence without Proof.

Ass. 1702. per  
Haffet.

BUT it has been ruled, that if a Deed be forty Years old, and Possession hath not gone along with the Deed, they ought to give some Account of the Deed, because the Presumption fails that was established in Behalf of such Deeds, where there is no Possession, for 'tis no more than old Parchment, if they give no Account of its Execution.

Trin. Ass. 1700,  
in Kent.

BUT if there be any Blemish in the Deed, by Razure or Interlineation, then the Deed ought to be proved, though it be forty Years old; if the Witnesses be living, then they ought to prove it by the Witnesses, but if  
the

the Witnesses be dead, they ought to prove the Hands of the Witnesses, for then there must be (as is said) a Presumption in Favour of the Deed when it was worn out of the Memory of the Witnesses, yet that Presumption is encounter'd by another Presumption from the Blemishes of the Deed itself, and therefore the Credit of the Deed ought to be restored by the Proof of the Execution of it.

So that if the Deed imports a Fraud, as Chattle and Pound, Hill. Ass. 1701, in Kent. where a Man conveys a Reversion to one, and after conveys it to another, and the second Purchaser proves his Title, there the first Deed must be proved, though forty Years old, for the Presumption from the Antiquity of the Deed, is destroyed by an opposite Presumption, for no Man shall be supposed to be guilty of so manifest a Fraud, and therefore here also the Credit of the first Deed must be restored, by proving a fair Execution of it.

If a Deed of Feoffment be proved, and the Possession has gone along with the Deed, there the Livery shall be presumed, though it be not proved, for when there has been Possession in the Manner that the Deed sets forth, it sounds a very strong Presumption, that the Possession was delivered in the Manner that the Deed sets forth; for that there should be a Contract, to transfer Possession, and that Possession should go according to that Contract, are such concurring Circumstances



stances as cannot be accounted for, unless the Possession was transferred according to the Contract, and consequently the Livery and Seisin must be supposed by the Jury.

Pl. Com. 6, 7.

BUT if Possession hath not gone along with the Deed, then the Livery must be proved upon the Feoffment; for since the Livery is to give the Possession on the Deed, where no Possession is, the Presumption is, that there was no Livery, and consequently the Livery must be proved to encounter that Presumption.

Rel. Rep. 132.  
Tri. per Pais 339.

BUT if the Jury find the Deed of Feoffment, and that the Possession hath gone along with the Deed, yet the Judges upon such finding, cannot adjudge it a good Conveyance, for the Jury are Judges of the Fact, and what is probable, and what is improbable; the Court is only Judge of what is Law, and have nothing to do with any Probabilities of Fact; therefore it is the Jury only that are to make the Conclusions and Deductions as to the Truth of the Fact; the Court cannot make any Conclusions or Deductions of the Truth of Facts, if they are not drawn by necessary Consequence, out of the Words of the Verdict; for to the Court, the Rule is \* *De non apparentibus et non existentibus eadem est Ratio*, therefore they can't conclude, that there was a lawful Conveyance, unless the Jury find the Delivery of the Deed.

\* *If a Matter does not appear, it is the same as if it did not exist.*

A DEED

A DEED of Feoffment may be given in <sup>Tri. per Pais 209.</sup> Evidence as a Release, for where the Party is in Possession already, the Deed only will be a sufficient Contract, to transfer a Right.

SECONDLY, A Deed may be given in <sup>2 Sid. 269. Tri. per Pais 347.</sup> Evidence, on a Rule of Court without proving such Deed, for if the Party consent, that shall be look'd upon as a good Deed, and that Rule is Evidence of the Validity of such Deed, for the Consent of Parties concerned, must be sufficient and concluding Evidence of the Truth of such Fact, for they are only to try the Truth of such Facts wherein the Parties differ.

### W I L L S.

IN proving a Will according to the Stat. <sup>2 Will. Rep. 509. 510.</sup> of Frauds and Perjuries, if one Witness prove that the other two were there present, this is a Proof sufficient of such Will, without having all the Witnesses thereto to prove it; for then it is proved by a Witness, that the Will was executed according to the Method required by the Statute, unless they shew such Characters of Fraud, as would make it necessary to produce the rest.

### Will-Razure.

WE come now to give an Account where the Razure and Interlineation, and where the breaking off the Seal, avoids the Deed.

As

As to Razure, Interlineation and Addition,

10 Co. 92.

FORMERLY if there were any Razure or Interlineation, the Judges determined upon the Profert of the Deed and View of it, whether the Deed was good or not; for the very Contrivance of the solemn Contracts, such as Deeds are, and their Preference to Verbal Contracts, was founded on this, that the Intent of the Parties is there manifestly settled in express Words, and notoriously authenticated, and there such Contracts are totally referred to the Court, if the Truth of the Solemnities, *viz.* of the Seal and of the Delivery be admitted, and therefore must be dissolved by a Contract of equal Solemnity, because how they are destroy'd and avoided, must appear to the same Judges that are by the Law to determine of them; From hence also it came to pass, that if a Deed was razed or interlined, they adjudged it a void Deed, because it did not certainly appear to the Court, that were the Judges of those solemn Contracts, whether the Mind of the Party was contained in such a mangled Contract or not.

*Ibid.*

BUT as the Manner of Conveyancing, swell'd from the short little Deeds to large and voluminous ones, so vast Room was left to the Misprisions of the Clerks, that must be altered and amended, or with greater Labour and Expence of Time written over again; from thence the Court thought it  
neces-



necessary not to discharge the Deeds razed or interlined as void, upon the Demurrer; but they referred to the Jury upon the Issue of \**Non est Factum*, whether this Deed thus razed and interlined, was the individual Contract delivered by the Parties.

If a Deed be altered by a Stranger without the Consent of the Obligee, in a Point not material, this doth not avoid the Deed; but otherwise it is, if it be altered by a Stranger in a Point material, for the Witnesses cannot prove it to be the Act of the Party, that sealed and delivered it when there is any material Difference from the Sense of the Contract; but if the Contract doth contain the Sense of the Parties, the Witnesses may well swear it to be their Act, for an immaterial Alteration doth not change the Deed, and consequently the Witnesses may attest that very Deed without Danger of Perjury.

11 Co. 27.  
2 Str. 1160.

BUT if the Deed be altered by the Party himself, though in a Point not material, yet it will avoid the Deed; for when the Party himself makes any Alteration in his own Deed, it discharges the Contract, for the Contract hath the whole Form from the Words of the Obligor; now when the Obligor undertakes to supply it with new Words, and to alter those the Party hath fix'd upon, this is, according to the Rules of Law which takes every Man's own Act most strongly against himself, a new making and a new framing

\* *Not his Deed.*

framing of the Contract, and for a Man to contract with himself is utterly void and ineffectual.

ANOTHER Reason of this Interpretation of Law might be, to add a Sanction to Deeds, that Persons who had them in their Custody, might not alter them for fear of destroying their own Securities.

11 Co. 28 b.

If there be several Covenants in the Deed, and one of them be altered, this destroys the whole Deed, for the Deed is but a Complication of all the Covenants, so that the Deed which is the whole, cannot be the same unless every Covenant of which it consists be the same also.

2 Rol. Abr. 29.

ALL Interests that pass without Deed, would pass, though the Deed was afterwards interlined or altered, yet the Interest once vested, did not thereby return back again since the Deed is not absolutely necessary to the passing of the Interest, but is only Evidence that it was pass'd, but by the Statute it is necessary to shew a Writing under the Hands of the Parties.

Quere, whether that be not afterwards vacated by an Interlineation.

Rol. Rep. 39, 40.  
2 Rol. Abr. 29.

If there be Blanks left in an Obligation in Places material, and fill'd up afterwards by the Assent of the Parties, yet the Obligation is void: But if there is a Blank left in an

an Obligation, and fill'd up afterwards with something immaterial, this doth not avoid the Contract, for where there is a material Part of the Contract added after the Sealing and Delivery, it is not the same Contract that was seal'd and delivered.

As if a Bond was made to C. with a Blank left for Christian Names and Addition, which is afterwards fill'd up by the Assent of the Parties, yet this is a void Bond. Rol. Rep. 39, 40.

BUT if any immaterial Part of the Contract be added after Sealing and Delivery, yet it is in Effect the same Contract, and therefore it shall not be avoided by these Additions. Vent. 185.

As if A. with a Blank left after his Name, be bound to B. and after C. is added as a Joint Obligor, yet this does not avoid the Bond, because this does not alter the Contract of A. for he was bound to pay the whole Money without such Addition. Ibid.  
2 Lev. 35.  
2 Keb. 872, 881.  
Moor 547, 619.  
Cro. Eliz. 627.

Where the Seal is broken off.

WHERE a Thing lies in Livery, a Deed formerly sealed, may be given in Evidence relating to it, though the Seal be afterwards torn off, for the Interest passed by the Act of Livery that invests the Party with the Possession, and the Possession that was once transferred by the Deed, doth not return back again, though the Deed was cancell'd, and the Deed is only an Evidence of transferring Palm. 403.  
Mod. 11.  
Vent. 14.  
2 Keb. 556.  
2 Lev. 220.  
2 Show. 28.



ferring Possession, for by the Act of Livery the Possession passes, and the Deed without the Seal (the Livery being indorsed) is an Evidence of such Possession; so if the Conveyance was made by Lease and Release, the Uses were once executed by the Statute, and they do not return back again by canceling of the Deed.

### Deeds Cancelled, &c.

<sup>2</sup> Bulst. 79.  
 Rol. Rep. 188.

BUT if a Man shews a Title to a Thing lying in Grant, there he fails if the Seal be torn off from his Deed; for a Man cannot shew a Title to a Thing lying in solemn Agreement, but by solemn Agreement, and there can be no solemn Agreement without a Seal; so that Possession alone is no good Title, since the Thing itself doth not lye in Possession, but in Agreement; therefore a Man cannot claim a Title to a Water-Course, but by Deed and under Seal.

Ibid. 39, 40.  
<sup>2</sup> Bulst. 246.  
<sup>2</sup> Rol. Abr. 28,  
 29, 30.

WHERE a Contract creates an Obligation, it can't be pleaded, if the Seal be taken off, for the Seal is the essential Part of the Deed, and without a Seal it is no longer a Deed, nor to be pleaded, nor given in Evidence as a Deed, unless in the Case above mentioned, where the Interest vests, though the Deed hath no Continuance; but where the Deed is necessary to be shewn, in order to acquire the Interest, there it must have the Essentials of a Deed, when it is shewn as such.

If

If an Obligation were sealed when pleaded, and after Issue join'd, the Seal was torn off, yet shall the Plaintiff recover his Debt, because the Deed when proffered to the Court, was in the Custody of the Law, and therefore the Law ought to defend it; besides the Truth of the Plea, which is to be proved, must have relation to the Time when the Issue was taken, and at the Time of the Issue it had the Essentials of a good Deed, and therefore that is sufficient to maintain the Issue.

Owen 8.  
Cro. El. 120.  
5 Co. 119. b.  
2 Bulst. 247.  
Dy. 59. pl. 12, 13.  
Co. Lit. 283. a.  
Doct. Placit. 262.  
Rol. Rep. 39, 40.  
2 Rol. Abr. 29.

Also if the Seal of a Deed be broken off in Court, it shall there be enrolled for the Benefit of the Parties, because where any Thing is impaired under the Custody of the Law, it shall be restored by the Benignity of the Law as far as possible.

2 Inst. 676.

If there be a Joint Contract or Obligation, and one of the Obligors Seals be torn off, it destroys the Obligation, because they are both bound as one Person, and if one be discharged, the other can't stand obliged, because they both make up but one Obligor.

Noy 112.  
2 Rol. Rep. 30,  
40.  
5 Co. 23. a.  
Cro. Eliz. 546.  
Doct. Placit. 260,  
262, 263.  
Poph. 161.

But if two Persons be bound severally, there if the Seal of one of the Obligors be broken off, yet the Obligation continues in the other, because there are several Contractors, and several Contracts, and therefore by destroying the Obligation of one of them, the Obligation of the other is not taken away.

5 Co. 23. a.  
Cro. Eliz. 546.  
2 Rol. Rep. 40,  
149.  
Cro. Eliz. 408,  
546, 576.  
11 Co. 23. b.  
Doct. Placit. 260,  
262, 263.

But

March 125.

2 Show. 29.

BUT if two Men are bound jointly and severally, and the Seal of one of them is torn off, this is a Discharge of the other, for the Manner of the Obligation is discharged by the Act of the Obligee, and therefore that is (according to the Rule of Law that construes every Man's own Act most strongly against himself) a Discharge of the Obligation itself; besides, since both are jointly bound as one Person, the Person discharging one of them is a Discharge of the Whole, and a Satisfaction is supposed by the very cancelling of it to be given for the whole Debt, and when one Man is discharged, that concurs to make an Obligor, and the whole Debt is satisfied, no Obligation can rest upon the other.

WE come now to other written private Evidences that are not under Seal, and this we must consider at Common Law, and according to the Alteration that has been made by the Statute of Frauds and Perjuries.

FIRST at Common Law; and here in the first Place, the Evidence of Notes is to be considered, and here we have already shewn that the Comparison of Hands is sufficient Evidence of such Notes, without any other Witnesses that see the Party write it.

Hardr. 485, 486, 487.

Danv. Abr. 27. pl. 5.

Now these Notes are either such as pass according to the Custom of Merchants, or

Lev. 298, Vent. 152. Mod. 285. 2 Keb. 695, 713, 726, 758, 822. Freem. 14. 2 Lutw. 1594. 5 Mod. 13, 367. Salk. 125. 6 Mod. 129. Ld. Raym. 175. 2 Ld. Raym. 753, 759. 8 Mod. 373. 11 Mod. 190. 12 Mod. 37, 107. Stra. 680.

that



that pass between Party and Party; of Merchants Notes, and they are in Nature of Letters of Credit passing between one Correspondent and another in this Form, *Pray pay to J. S. or Order, such a Sum, Witness my Hand, J. N.* Now if the Correspondent accept the Notes, from thence he becomes chargeable in a special Action on the Case on the Custom of Merchants, but not in an Action of Debt; for a Debt is created by receiving Money from another, or by Promise or solemn Acknowledgment of an Obligation; now here is no Promise in the Correspondent to J. S. nor any Money received by him, but there is an Acceptance of the Bill, whereby Money is presumed to be lodged in his Hands, and after such Acceptance it is an Injury to J. S. to deny the Payment, because he relied on the Credit given by the Acceptance, and by Consequence, the Damage arises which is the Ground of all Assumpsits.

BUT to understand this Matter aright, we must consider the Nature of Bills of Exchange a little more extendedly from their Original.

ALL Exchange is made either in Goods or Money; if the Merchant barter Goods for Goods, he turns them into Money of his own Country, and makes up the Account of Profit or Loss, and the Balance of such Account is the Money of his own Country.

I

WHEN

WHEN on any Occasion he exchanges Money, he compares the Weight and Fineness of the Money of each Country, and makes the Exchange according to the Proportion of the Weight and Fineness found in the Money of each Country, since an Ounce of Gold or Silver must be equal to the same Ounce in any other Country, and this governs the Exchange, and establishes the Rules of Reduction.

THE third Way of Exchange, is by Bills of Exchange or Letters of Credit.

\* Bills of Exchange, Notes of Acceptance.

CREDIT is not meerly in Proportion to the Original Fund or Stock, that a Man sets up with, but also in Proportion to the Trade, the Trader manages; for if a Man sets up with 500*l.* and takes up Goods on Credit, to the Value of 1000*l.* and contracts to pay down half the Money, and the other half at six Months End, if in his Trade he doubles the Commodity in six Months Time, as is sometimes done, he may pay off the 500*l.* and his 500*l.* is doubled.

Now because the Merchant finds that Credit is the Life of Trade, therefore all Me-

\* See Bill of Exchange, Acceptance, Credit, and other proper Titles relating to this Subject in *Posseltway's Universal Dictionary of Trade and Commerce.*

thods are used among them that promote Credit; and by Consequence in the Correspondence of foreign Merchants, one with another, they often give Credit to one another's Bills, tho' the one Merchant has not Effects of the other in his Hands, to answer such Bills; and the Method of Exchange is made in this Manner.

*A.* A Merchant of *Amsterdam* hath *B.* his Correspondent in *London*, *C.* a third Person is coming over from *Amsterdam* to *London*, and hath Money in *Amsterdam*, and hath occasion for such Money at *London*; *C.* therefore pays in his Money to *A.* and *A.* draws a Bill upon *B.* praying him to pay to *C.* the Money in *London*, if *B.* so far credits the Bill as to accept it, then is he a Debtor to *C.* according to the Custom of Merchants, and if *B.* pays the Money, then is *A.* Debtor to *B.* upon Account for such Money paid; and if *C.* does not himself deliver the Bill, but indorses it over to a Third Person, such Third Person stands in his Place, and *C.* and *A.* are liable to him, and *B.* if he accepts the Bill; if *B.* does not accept the Bill, or after Acceptance, does not pay it, the Bill is protested before a Notary, and the Bill and Protest sent over, then is the Original Drawer of the Bill liable to answer the Money. In this Custom there are four Things considerable.



1. The Bill.
2. The Acceptance.
3. The Protest.
4. The Indorsement.

Molloy B. 2.  
c. 10.

FIRST the Bill, and this is in Nature of a Letter desiring the Correspondent to pay so much Money, either in *English* or foreign Money, according to their usual Value in Proportion to the *English* Coin, or else according to a Rate agreed upon between them, the Bill is either payable at Sight, or, as they term it, Single, Double, or Treble Usance, which is one, two, or three Months to be computed from the Date of the Bill.

THE Bill gives the Correspondent an Authority to pay the Money to the Deliverer of the Bill on his Behalf, and therefore till the Money be paid, 'tis subject to be countermanded, tho' the Bill was accepted, for possibly the Bill was only given to the Deliverer upon Credit, and upon further Inquiry into his Circumstances, it may be necessary to countermand the Payment; therefore if the Correspondent should pay the Bill before the Time appointed, and a Countermand should come, the Drawer is not liable, because he gave no Authority to pay it before the Time in the Bill; if several Drawers subscribe the Bill, all are liable in Case of a Protest.

2dly, THE Acceptance, and that is gi-  
 ving Credit to the Bill so far as to make him-  
 self liable, and to trust for a Repayment to  
 his Correspondent ; if a Bill be drawn upon  
 two, it must have a joint Acceptance, other-  
 wise it may be protested, for the Authority  
 to pay the Money, is committed to them  
 both as one Person.

BUT if the Bill be drawn on two or either  
 of them, either of the Persons may accept  
 the Bill, and if one of them accepts it, it  
 can't be protested for Non-acceptance, but  
 the Party accepting is only liable to the  
 Action, because he only has given Credit to  
 the Bill.

BUT in Case of two Joint Traders, the  
 Acceptance of the one will bind the other,  
 because they trade for a common Benefit,  
 and therefore where one of them gives Cre-  
 dit, it is the Act of them both ; but if a  
 Factor of the *Hamburg* or *Turkey* Company  
 draws a Bill on such Company, and any  
 Member accepts it, it shall not bind the  
 Company, nor any other Member of it, be-  
 cause it is only a private Act of such Per-  
 son, and not a corporate Act of the Com-  
 pany.

ALSO if ten Merchants employ one Factor,  
 and he draws a Bill upon them all, and one  
 accepts it, it shall only bind him and not  
 the rest, because they are separate in Interest

Moll. B. 2.  
 c. 10. sect. 18.

Ibid.

Winch 24, 25.  
 Styl. 370.  
 Moll. B. 2. c. 10.  
 sect. 18, 19, 29.  
 Ld. Raym. 175.  
 Salk. 126.  
 2 Salk. 442.  
 3 Bac. Abr. 612.  
 5 Mod. 398.  
 12 Mod. 345.  
 Hardr. 485.  
 Vent. 152.  
 Lev. 198.

one from the other. A small Matter amounts to an Acceptance.

3 Bac. Abr. 610.  
Moll. B. 2. c. 10.  
sect. 20.

As if a Merchant say, leave the Bill with me, and To-morrow I will accept it; this is an Acceptance, for 'tis giving Credit to the Bill, and hindering the Protest in the mean Time.

Moll. B. 2. c. 10.  
sect. 20.

3 Bac. Abr. 610.  
Stra. 648.

Ld. Raym. 444.

2 Stra. 817.

Barnard. K. B.

87.

2 Ld. Raym.

1542.

2 Stra. 955.

Hardw. 136.

2 Barnard. 320.

2 Stra. 1000.

BUT if the Merchant say, leave the Bill with me, and I will look over my Books and Accounts between the Drawer and me, call To-morrow, and accordingly the Bill shall be accepted, this is no compleat Acceptance, because it depends upon the Balance of the Account, and on the Merchant's having Effects in his Hands to answer it, so that the Merchant gives no absolute Credit to the Bill, but the Deliverer was willing to commit it to him, and to delay the Protest till his Answer. \* The Bill may be accepted in Part, if the Merchant has Effects in his Hands only to answer Part, and be protested for the Residue.

4 Comb. 452.

Moll. B. 2. c. 10.  
sect. 20.

Str. 214.

2 Str. 1152,

1195, 1212,

Salk. 129.

3dly, THE Protest; and that is made before a Publick Notary, in Case of Non-acceptance or Non-payment.

THE Notary is a Publick Person appointed, to whose Protestation all foreign Courts give Credit, and the Protest is Evidence, that the Bill is not paid; when it is returned protested, the Drawer is obliged to answer the Money, and Damages, or give sufficient Security

Moll. B. 2. c. 10.  
sect. 17.

Skin. 272.

Holt 465.

2 Str. 910.



curity to answer the same within double the Time that the first Bill had to run; beyond Seas the Protest under the Notary's Hand, is sufficient to shew the Court without producing the Bill itself, but in *England* they must shew the Bill itself, as well as the Protest, because the whole Declaration must be proved, which can't be without giving the Bill in Evidence.

A WIFE or Servant cannot accept a Bill, without an Authority from the Husband or Master, unless they usually made such Acceptances. Moll. B. 2. c. 10. sect. 27. Styl. 307.

*A.* draws a Bill upon *B.* and *B.* being in the Country, *C.* his Friend accepts it, the Bill must be protested for the Non-acceptance of *B.* and then *C.*'s Acceptance shall bind him to answer the Money. 12 Mod. 410. Salk. 129. 3 Bac. Abr. 608. Comyn. 76. Lutw. 891, 892, 896, 899. Carth. 129.

So if a Bill be not accepted, and a third Person accepts the Bill for the Honour of the Drawer, this shall bind him to answer the Money, because he hath given Credit to the Bill, and by Consequence he must answer the Money for which he hath given Credit. Moll. B. 2. c. 10. sect. 33.

NOTE, that the Protest for Non-acceptance, or Non-payment must be made and sent over in due and convenient Time, that the Drawer may have Remedy upon his Correspondent, if he has Effects in his Hands, and the convenient Time, according to the Custom of *London* they allow, is three Days of

Ld. Raym. 1743.  
Show. 164.  
2 Str. 792, 829.  
Barnard. K. B.  
303.

Grace, for Payment after the Bill is become due, which seems to be like the \* *Quarto die Post*, on Return of Writs, and might have sprung from thence, for the *Saxons* thought it unbecoming a Freeman to be forced to an Act immediately. When the three Days of Grace are out, the Deliverer must protest the Bill, and send it away by the next Post, if the three Days of Grace end on a *Saturday*, he must protest it on *Monday*, and if the Protestation within the Time be neglected, the Money will not be answerable upon the Drawer because the Bill of Credit was given instead of Money, and if the Deliverer neglects to protest it in due Time, 'tis the Deliverer has given Credit to the Correspondent, and therefore ought not to be answered by the Drawer of the Bill.

Mell. B. 2. c. 10.  
sect. 28.  
Styl. 370.

NOTE also that a Bill once accepted, cannot be revoked, although the Acceptor has Advice that the Drawer is broke, because by Acceptance he hath given Credit to the Bill, and after Credit given the Acceptor has made the Bill his own, and by the Custom the Payment is to be made where the Credit was given; and the Custom must be particularly alledged, being the Foundation of the Action; or the Party will be nonsuited, but we need not alledge a particular Place of Demand, because that it was demanded, is not traversable, and because that appears on the Protest of the Notary, therefore the Demand is not Part of the Custom on which the Action is founded.

4thly,

\* *Fourth Day after.*

4thly, Of the Indorsement, 'tis usual when Bills of Exchange are drawn, especially if they are payable at two or three Usances, for the Deliverer to indorse them over to others in the Traffick of Goods and Commodities, and the Receiver of such Bills has not only the Original Credit of the Drawer at Stake, and of the Acceptor, if the Bill be accepted, but also of the Indorsees of such Bills, because such Indorsees have past such Credit in their Payments, instead of Money, and the Persons receiving such Bills, have Actions in their own Names against either, for all their several Credits are at Stake, when they have passed their Subscriptions instead of Money.

W I T N E S S E S.

WE come now to consider the unwritten Evidence, or the Proofs from the Mouths of Witnesses, and here we must consider who are totally excluded from Testimony, and by what Rules we may distinguish the Truth on contradictory Evidence.

1st, WHO are totally excluded from all Attestation, and that is for want of Integrity and Discernment.

THOSE who are totally excluded from all Testimony for want of Integrity, are:

FIRST,



FIRST, Persons interested in the Matter in Question, and here the General Rule is, that no Man can be a Witness for himself, but he is the best Witness that can be against himself.

Now where a Man who is interested in the Matter in Question, would also prove it, 'tis rather a Ground for Distrust than any just Cause of Belief; for Men are generally so short-sighted, as to look at their own private Benefit which is near to them, rather than to the Good of the World, that is more remote; therefore from the Nature of human Passions and Actions, there is more Reason to distrust such a bias'd Testimony, than to believe it; it is also easy for Persons who are prejudiced and prepossessed to put false and unequal Glosses for what they give in Evidence, and therefore the Law removes them from Testimony, to prevent their sliding into Perjury, and it can be no Injury to Truth, to remove those from the Jury, whose Testimony may hurt themselves, and can never induce any rational Belief.

To explain this Rule, we must consider what the Law looks upon as Interest, and it is where there is a certain Benefit or Disadvantage to the Witness attending the Consequence of the Cause one Way, and therefore in the first Place, a naked Trust doth not exclude a Man from being a Witness; for since there is no false Bias on his Conscience,

science, there is no Reason to exclude him from the Attestation of the Truth, therefore a Guardian in Socage may be sworn for his Ward; an Infant bringing his Action by Guardian, the Guardian on Record, not allowed to be a Witness, because if the Action be frivolous, the Expence of such Action will not be allowed him in his Discharge, and therefore the Guardian that would be sworn to support this Action, swears to the maintaining his own Interest, and consequently is not a competent Witness.

Lent. Aff. 1714.  
per Parker, C. J.  
Mod. 107.  
Str. 506, 548.  
2 Str. 1026.

*Witnesses Interested.*

AN Executor may be sworn in a Cause relating to the Will, where he is not Residuary Legatee, because he is no more than a Trustee, and has no Interest.

Mod. 107.  
3 Will. Rep. 181.  
contra.

WHERE a Man has a Trust coupled with an Interest, he can't be sworn in the Proof of it, because he is look'd upon in Law as Master of the Estate of it.

Hale sup. Litt. 6.

As where *A.* has the Freehold in Trust for *B.*; *A.* can't be sworn in Defence of it, because he is look'd upon in Law as Master of the Estate, for the Cestui que Trust can't deduce a legal Title in the Ejectment, and the Trustee must not be sworn to derive a legal Interest to himself.

Tri. per Pais 315.  
The Law is now otherwise.  
Will. Rep. 290.  
3 Will. Rep. 181.

NOR can the equitable Cestui que Trust be sworn to the Title, for Equity is Part of the

Tri. per Pais 315.  
3 Chan. Rep. 22.

the Law of *England*, and therefore the Law ought so far to take Notice of the equitable Interest as to exclude the Owners of such Interest, who do really enjoy the Benefit of the Estate from any Attestation.

Hale sup. Lit. 6.

TENANT at Will has been allowed to prove Livery of Seisin in the Lessor, for a Man can't be said to get or lose where he has only a precarious Interest, and not such certain Benefit or Charge out of the Estate as he may recover in an Action: Now Tenant at Will can maintain no Action for the Possession in his own Right, and therefore by his Oath he doth not defend any Estate or Interest of his own, he is but in Nature of a Bailiff or Servant to the Freeholder, and the Law does not exclude Servants to be sworn in Behalf of their Masters.

Mod. 21.  
2 Keb. 576.

BUT if a Man promise a Witness that if he recover the Lands, he shall have a Lease of them for so many Years, this excludes the Evidence; for here the Witness would have a fixed and certain Advantage by the Event of the Verdict, and by Consequence his Attestation is to derive an Interest to himself.

Ibid.

A *Scire Facias*, that is a Writ to *shew Cause*, was brought by the King to avoid a Patent, and Exception was taken to the Witness because he was Deputy to the Person that would avoid it, but the Exception was disallowed because the *Scire Facias* was in the King's Name, and therefore can't be presumed



sumed that the Interest is in another, which would destroy the very Being of the *Scire Facias*, for no Judge ought to presume contrary to the Record that the Interest is in another, but the Proof of that ought to come in on the Defendant's Side to destroy the Proceedings.

'Tis no good Exception to a Witness, that he has \* *Common per Cause de vicinage* in the Lands in Question, for this is no Interest in the Land, but only an Excuse for Trespass; and let who will recover the Lands the whole Right of Common remains, so that he is certainly indifferent in Point of Interest between the two Contenders. The same Law as to Common of Shack.

Tri. per Pais

309.

See 7 Co. 5.

If a Man makes a Feoffment to one, and afterwards makes a Feoffment to another of the same Lands, and in the second Feoffment makes divers Covenants that he was seised in Fee at the Time of the Feoffment, and that the Feoffee should quietly enjoy, and after upon an Issue taken whether there were any former Feoffments, the Feoffor shall not be sworn to prove that there was not, because the Feoffor in this Case would be sworn to save himself from the Breach of Covenant in the second Feoffment, and therefore he is concerned in Interest in the Success of the Cause, and ought to be excluded from all Attestation.

\* *Common by Reason of Vicinage.*

IN

In all publick Prosecutions the Party injured may be a Witness where there is only a Fine to the King, and no private Advantage arising to himself by such a Prosecution; but if there be any Advantage of private Benefit to accrue by the Prosecution, the Party is equally excluded as in a private Action.

Hard. 331.

2 Rol. Abr. 685.

In an Information of Assault and Battery the Person injured may be a Witness, because here the Fine is to the King, and no private Benefit accrues to the Party as the Result of the Prosecution.

BUT such Verdict in an Information founded only on the Party his own Oath can't be given in Evidence in a Civil Action, for that were indirectly to suffer the Party to attest in his own Behalf.

BUT where on any publick Prosecution there arises any private Advantage to the Prosecutor, there he can't be a Witness, because that were plainly to attest in his own Behalf, which can never be admitted.

Hard. 331.

2 Str. 728.

L. E. 57. pl. 22.

THEREFORE on an Information of Forgery the Party whose Right was prejudiced by the forged Deed cannot be a Witness, because there plainly results a private Benefit to the party from the Success of the Prosecution.

So

So in an Information on the Statute of Usury, the Party to the usurious Contract cannot be a Witness, because that would be to avoid his own Securities; but after he hath paid the Money he is a good Witness, because then the Party guilty is fined to the King, and there is no Advantage to the Prosecutor by the Information.

Co. Lit. 6. b.  
2 Rol. Abr. 685.  
Raym. 191.  
Tri. per Pais 308.  
Farref. 118.  
Ld. Raym. 396.  
Str. 633.  
L. E. 58. pl. 23.  
59. pl. 24.

So in an Information of Perjury, the Person injured by the Perjury cannot be a Witness, because the Party injured by the Perjury gains ten Pounds on the Statute by Conviction.

Hard. 331.  
2 Sid. 237.  
2 Rol. Abr. 685.  
2 Str. 1043.  
1104. but 1229.  
contra.

In an Information of a Cheat for obtaining a Judgment, the Wife of the Party against whom the Judgment was obtained, was allowed to be Evidence, because on such Information the guilty Person is fined to the King, that is the meer Result of the Prosecution, for the Court doth often set aside the Judgment to vindicate the Affront done to the Court, yet that is not a natural nor a necessary Consequence of the Prosecution, and the Grace of the Court ought not to stop the Course of the Law, or deprive the King of a Witness to punish Offenders.

Vent. 49.  
2 Sid. 431.  
2 Keb. 572.  
Tri. per Pais 323, 328.  
Str. 595.  
Salk. 286.  
L. E. 57. pl. 22.  
12 Mod. 340.  
but 2 Str. 1043.  
Salk. 283.  
Ld. Raym. 396.  
contra.

NOTE; the Party imposed upon was allowed to be an Evidence, and the Defendant found guilty upon her Oath, and the Judgment afterwards vacated.

If



Tri. per Pais  
309.

IF the Obligee devises the Debt to the Obligor, and the Executor delivers up the Bond in Satisfaction of the Legacy, and the Bond is cancell'd, and after the Validity of the Will is questioned, *viz.* whether the Testator was *\*compos* or not, the Obligor is said to be a good Witness to the Will, because the Obligation being cancell'd, he can never be charged at Law upon a cancell'd Bond, for 'tis the Seal that creates the Obligation.

Quere, Whether any Remedy in Equity.

Ibid.

BUT otherwise it is in case of a Mortgage, for though the Mortgage be cancelled, yet the Right being transferred doth not cease or go back again by the cancelling of the Deed.

Now the Mortgagee at Law hath an absolute Estate, and Equity admits of no Redemption but upon discharging the Mortgage Money, so that in such a Case the swearing the Testator to be *\*compos* after cancelling the Deed of Mortgage would still be in Defence of his own Interest, for the Estate doth not come back to the Mortgagor but by Virtue of the Devise.

Vent. 351.

THE Men of one County, City, Hundred, Town, Corporation or Parish, are Evidence in Relation to the Rights, Privileges, Immunities and Affairs of such Town, City, &c. if they are not concerned in private Interests in relation thereunto, nor advantaged by

• In his Senses.

by such Rights and Privileges as they assert by their Attestation. Men of the County are Evidence on an Indictment for not repairing a Bridge, whether it be in Repair or not, for they are perfectly indifferent, because 'tis equal to any Man that the Bridge for Convenience of Passage should be repaired where 'tis necessary, as that they should not be put to unnecessary Charge, for every Man for the Convenience of his own Passage is concerned to uphold the Bridge, and cannot be thought to create a useless Charge; so that he is perfectly indifferent being equally concerned on both Sides of the Question.

BUT the Men of the County can't be sworn <sup>2 Sid. 192.</sup> in a Cause relating to the Bounds of the County in a Suit depending between that and another County, carried on at a County Charge, because every Man is in such a Case concerned to prevail in Point of Interest.

IF the Hundred be sued on the Statute of <sup>2 Rol. Abr. 685.</sup> *Winton*, no Person of that Hundred can be <sup>pl. 6.</sup> a Witness, because every Person's Interest is concerned in the Tax of the Hundred, and therefore swears in his own Discharge\*.

So the Inhabitants of a Parish can't be <sup>Hob. 92.</sup> Witnesses in relation to Common or the † *Modus Decimandi*, because this touches the private Interest of those Persons, and the Loss or Gain falls upon their private Fortunes.

\* By Stat. 8 Geo. 2. c. 16. sect. 15. Inhabitants of the Hundred to be admitted as Witnesses at Trials on the Statutes of Hue and Cry, and see after 131.

† *Manner of Titling.*

2 Stra. 1069.

So in a Corporation the Inhabitants and Freemen are Witnesses to any Thing relating to the Publick, where they are not concerned in Gain or Disadvantage in Relation to their private Fortunes, but where any Loss or Disadvantage is consequent to the Witness on the Trial he must be excluded.

Vent. 351.

Tri. per Pais 327.

2 Show. 146.

but 3 Keb. 295.

L. E. 66. pl. 50.

contra.

IN an Action on the Case brought by a Mayor and Commonalty concerning the Water Bailage, a Freeman of London may be a Witness, because the Freemen are not concerned in the Privilege by immediate or private Interest, nor do they get or lose by the Consequence of the Trial.

Sed. 109.

So in a Gift to a Corporation any Member may be Witness if the Gift be publick, in relation to their Buildings, Schools or the like, because no Man gets or loses on the Event of the Trial.

Tri. per Pais 310.

L. E. 65. pl. 45.

BUT as to the Custom of Foreign-bought and Foreign-sold in a Corporation, none of the Freemen are to be admitted as Evidence, because every Man's private Interest is concerned in the Trial, and where a Man is concerned in the Consequence of the Trial, he can't support it by his Oath.

Tri. per Pais 327.

BUT in an Action brought by Parishioners for imbeziling the Stores, now by Statute 3 & 4 W. & M. c. 11. sect. 12. the Parishioners may be Witnesses, for the Statute in Behalf



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half of the Poor hath set aside the Rules of the Common Law in that Instance; and since the whole Riches and Improvement of the Nation arise out of the Labour of the poorer Sort, it is but reasonable that the Materials of their Labour should be abundantly secured against all Mismanagement.

WHERE a Statute Law could receive no Execution unless a Party interested were a Witness, there he must be allowed, for the Statute must not be rendered ineffectual by the Impossibility of Proof; and where the Statute can have no Force but by the Proof of the Person in Interest, there the Rules of the Common Law are presumed to be laid aside by the Statute, that it may have its Effect, which it would be totally deprived of by binding down the Proof to the strict Rules of the Common Law; and therefore this is an Exception out of the general Rule, for in this Case the Party in Interest is to be admitted.

THEREFORE in the Statute of *Winton* the Party robb'd may be an Evidence to charge the Hundred, for otherwise the Benefit of the Statute would be totally excluded, because no Person can be supposed present in such Transaction to give their Evidence.

2 Rol. Abr. 685.  
686.  
Tri. per Pais  
308, 309.  
3 Mod. 115.  
10 Mod. 193.  
Fortesc. 246.  
Vent. 351.  
12 Mod. 340.  
See 8 Geo. 2. c.  
16. sect. 15. and  
before 129.  
Tri. per Pais 310.

So it is where a Common Council Man would renounce the Covenant, any Freeman may be Evidence of his Election and Refusal, otherwise the Execution of the Act would be prevented by Impossibilities.

K 2

SOME

Tri. per Pais  
309, 310.  
L. E. 64. pl. 43.

SOME have extended this to the By-Laws of a Corporation, and 'tis said that in an Action brought by the Corporation of Weavers in *Norwich* for the Penalty of the By-Law, which ordains that no Weaver should work at his Trade in Harvest; and one of the Corporation allowed Evidence, though the Penalty was due to the Corporation, lest the By-Law should be eluded, which was made for a common Benefit.

BUT quere; for no Body of Men seem to be authoris'd to make a Law and attest a Breach of it, where it turns to their own Benefit.

3 Mod. 114.  
Str. 316.  
2 Str. 1181.  
10 Mod. 156.  
contra.  
See Fortesc. 246.  
Andr. 240, 241.

ON the Statute 13 *Car. 2. c. 10.* concerning the hunting of Deer, the Informer is good Evidence, though he hath Part of the Penalty.

3 Mod. 115.

THE same Law on the Statute of Conventicles.

FROM the first Rule several other Corollaries may be deduced.

Norton and  
Moult, Hil.  
1701.

1st, THAT the Plaintiff or Defendant can't be a Witness in his own Cause, for these are the Persons that have a most immediate Interest, and it is not to be presumed that a Man who complains without Cause, or defends without Justice, should have Honesty enough

enough to confess it, and therefore an Answer in Equity is of very little Weight where there are no Proofs in the Cause to back these Suggestions, because though it is the Constitution of the Court to examine the Parties upon Oath to discover the secret Practices complained of, yet there is very little Credit to be given to a Man's own Oath where there is no probable Circumstance to support it.

If any Witness who has Part of the Land sells, though \* *bona fide* and for good Consideration, if it be after he is summoned to be a Witness, or after he has had Notice of the Trial, the Court will not admit his Evidence.

2 Sid. 51.  
Keb. 134.  
Raym. 32.  
See Styl. 482.

ON an Information † *Qui tam pro Domino Rege* on the Act of Navigation, the Informer, on solemn Debates, was allowed to be a Witness though he was to have half the Forfeiture, and this § *ex necessitate rei*, otherwise the Statute would be eluded. *In Excb.*  
|| *cor. Hale, C. B. 23 Nov. 1722.*

See 10 Mod. 194.  
Stra. 316.  
contra.

AND yet, if there be but one Witness against the Defendant's Answer, the Court will direct a Trial at Law to try the Credibility of that Witness, for it is fit, when there is one Witness only in Counterbalance to the Defendant's Answer, and on that one Witness the Decree is to be founded, that the Court should inform their Conscience of his Credi-

Vern. 161.  
Pre. Ch. 19.  
3 Ch. Caf. 123.  
Eq. Abr. 229.  
pl. 12, 13.  
2 Bac. Abr. 293.  
Gilb. Chan. 139.

\* *Honestly.* † *Who as well for the Lord the King.*  
§ *From the Necessity of the Case.* || *Before.*



bility by a Trial at Law ; otherwise any Profligate's Oath may overturn a Man's Right without any Opportunity to object to his Credibility ; but when there are two Witnesses against the Answer, then there is so great an Overbalance of Credibility, that the Plaintiff ought not to be delayed in a Trial at Law.

Hale sup. Lit. 6.  
Sid. 237.  
Styl. 401.  
Sav. 34.  
Clay. 37.  
Godb. 326.  
L. E. 61.

BUT if any Person be arbitrarily made a Defendant to prevent his Testimony in the Cause, he shall not prevail by that Artifice, but the Defendant against whom nothing is proved, shall be sworn notwithstanding ; for here the Defendant does not swear in his own Justification, but in Justification of another with whom he is joined in the Action unnecessarily ; and were not this allowed, it were but for the Plaintiff to turn all the several Witnesses into Defendants, and he might be able to prove what he pleased without Contest ; therefore if there be an Action of Trespass against two, and there be no Evidence against one of them, he may be Evidence against the other.

BUT this Rule must be understood where there is no Manner of Evidence at all for the Defendant, for if there be Evidence against one, though not enough to convict him in the Judge's Opinion, yet such Person can be no Witness for the other, because his Guilt or Innocence must wait the Event of the Verdict, for the Jury are Judges of the Fact, and not the Judges ; and the Jury of their  
their

their own Knowledge may have further Light in the Fact than what they have from the Witness in Court.

THERE are several Informations of Perjury against *A. B.* and *C.* on their Depositions in Chancery concerning the same Point; on the Trial of *A. B.* and *C.* may be Witnesses, for they cannot be excluded by Reason of any Infamy until they are convicted, and they cannot be excluded as interested, because the Information of one is not Evidence either for or against the other, where the same Parties had not the Liberty of Cross-examination.

Hale sup. Lit. 6.  
2 Rol. Abr. 685.  
Forbes. 247.

TRESPASS against *A.* and *B.* for two Horses, Evidence against *A.* as to one, and the Question is if he may be a Witness for *B.* in relation to the other; and it seems that if it were the same Fact, and the Trespass committed at the same Time and Place, he may not be a Witness, because he swears to discharge himself; but if they were not a single Fact, but two distinct Trespases at different Times and Places, but arbitrarily joined in the same Declaration, then they may be Witnesses one for the other, because the Oath of one of them has no Influence on the Crime laid to his Charge, but merely goes in Discharge of the other. Quere.

Hale sup. Lit. 6. b.  
Str. 633.  
2 Str. 1095.

2dly, THE second Corollary on this general Rule is, that Husband and Wife cannot be admitted to be Witnesses for or against each other, for if they swear for the Benefit

Co. Lit. 6. b.  
2 Str. 1094.

of each other, they are not to be believed, because their Interests are absolutely the same, and therefore they can gain no more Credit when they attest for each other, than when any Man attests for himself.

Co. Lit. 6. b.  
H. H. P. C. 301.  
2 H. H. P. C.  
279.  
2 Hawk. P. C.  
433.

AND it would be very hard that a Wife should be allowed as Evidence against her own Husband, when she cannot attest for him; such a Law would occasion implacable Divisions and Quarrels, and destroy the very legal Policy of Marriage that has so contrived it, that their Interest should be but one; which it could never be if Wives were admitted to destroy the Interest of their Husbands, and the Peace of Families could not easily be maintained, if the Law admitted any Attestation against the Husband.

Brownl. 47.  
L. E. 53. pl. 11.

THE Wife, in case of High Treason, is not bound to discover her Husband's Treason, although the Son be bound to reveal it.

Raym. 1.

YET in case of High Treason the Wife is admitted as Evidence against the Husband, because this is for the publick Safety, which is to be preferred before the Interest or Peace of private Families, and the Ties of Allegiance are more obligatory than any other Relation whatsoever; for our Allegiance is founded on the Benefit of our Protection, which is to take Place of our Civil Interests that relate only to well being.

Hut. 116.  
St. Tri. 265,  
269.  
H. H. P. C. 301.  
Hawk. P. C. 431.

IN the Case of the Lord *Audley*, where the Husband assisted to the Rape of his Wife,

Rush. Collect. Part 2. Vol. 1. fol. 94, 99. Str. 633.

the



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the Wife was allowed a Witness, because it was a personal Force done to her, and of such secret Violence there could be no other Proof but by the Oath of the Wife.

BUT this Piece of Law hath since been exploded, that in a personal Wrong done to the Wife, the Wife may be Evidence against the Husband; because it may be improved to dreadful Purposes, to get rid of Husbands that prove uneasy, and must be a Cause of implacable Quarrels if the Husband chance to be acquitted\*.

Raym. 1.  
Vent. 244.  
2 Hawk. P. C. 431.  
Co. Lit. 6. b.  
2 Rol. Abr. 686.  
pl. 4.  
H. H. P. C. 301.  
2 H. H. P. C. 279.  
Brownl. 47.  
Hut. 116.  
2 Keb. 403. pl. 12.  
4 St. Tri. 608.

THERE is a great Difference between a Wife *† de Facto* and a Wife *§ de Jure*; for a Wife *§ de Jure* cannot be an Evidence for or against her Husband; but a Wife *† de Facto* may; as if a Woman be taken away by Force and married, she may be an Evidence against her Husband indicted on the Statute of 3 H. 7. c. 2. against the stealing of Women; for a Contract obtained by Force, has no Obligation in Law, and therefore she is a Witness in this Case as well as in any other Case whatsoever.

H. H. P. C. 301.  
302.  
2 Hawk. P. C. 432.  
Vent. 243, 244.  
2 Keb. 193.  
Str. 79.

A. marries with B. and afterwards with C. and by C. has Issue D. C. is an Heiress to certain Lands, and leaves them to descend to D. and between D. and a collateral Heir to

Kent. Aff. 1708.  
per Gould.  
Broughton v. Harper.  
2 Ld. Raym. 752.

\* Wife Witness to prove Goods delivered on her Husband's Credit. Stra. 504.

Declaration of Wife Evidence against her Husband in a Cause for nursing a Child. Stra. 527. *Anon.*

Wife Evidence against her Husband on an Indictment for assaulting her. Stra. 633.

*† In Fact.    § Of Right.*

C.

C. the Question of Title arose; and the Question was, whether *B.* could give Evidence of her Marriage with *A.* It was objected, that by the very Testimony of *B.* she supposes herself the Wife of *A.* and consequently she can depose nothing contrary to his Interest, and he by this second Marriage is intitled to be Tenant by the Curtesy; but to this it was answered, that the Trial in this Case could be no Evidence in the Question between *A.* and the collateral Heir, and therefore the Wife of *A.* might be a Witness. By *Gould* Justice.

<sup>2</sup> *Ld. Raym.* 752. BUT it was objected before *Holt*, on another Trial between the same Parties, that the Wife was no Evidence in this Case, because she by her Oath gains an Interest in an Husband, and so doth not stand as a fair and unprejudiced Witness, and he refused to admit her to be a Witness.

*Sid.* 75.  
*Salk.* 289.  
and holds in  
Equity.  
<sup>2</sup> *Cha. Caf.* 39.  
<sup>2</sup> *Vern.* 79.  
*Eq. Abr.* 226.  
*pl.* 14.

BUT no other Relation is excluded; because no other Relation is absolutely the same in Interest; but by the Civil Law, Servants and Children were excluded, because the Parents and Masters had an absolute Power over them, and therefore under that Law they swore with manifest Interest to themselves.

*Vent.* 197.  
*Style* 449.  
*Keb.* 505.  
*March* 83.  
<sup>2</sup> *Str.* 1122.  
<sup>2</sup> *Bac. Abr.* 287.  
<sup>3</sup> *Keb.* 2. *Nels.*  
*Pais* 308, 314.

3dly, A Man retained as Attorney, Counsel or Solicitor, cannot give Evidence of any Thing imparted after the Retainer, for

*Ch. Rep.* 81. <sup>3</sup> *Ch. Rep.* 66. *L. E.* 79, 80. *Skin.* 404. *Tri. per*  
*10 Mod.* 40. *12 Mod.* 341.

after

after the Retainer they are considered as the same Person with their Clients, and are trusted with their Secrets, which without a Breach of Trust cannot be revealed, and without such Sort of Confidence there could be no Trust or Dependence on any Man, nor any transacting of Affairs by the Ministry or Mediation of another, and therefore the Law in this Case maintains such Sort of Confidence inviolable.

BUT to what such Persons knew before their Retainer, they may be examined, for in that Case they are in the Condition of any other Person, and should be examined, what they know of their own Knowledge.

4thly, IF a Witness be a Party to the Crime, and left out of the Declaration on Purpose that he may be a Witness, yet this is no Objection that totally excludes him, for Partners in Guilt are not excluded from Testimony; because if the Rule was so rigid, in many Cases there could not possibly be any Proof at all; for in some Cases the Discovery must arise out of the Mouth of the Guilty; but this mightily lessens the Credit of a Witness, especially in all inferior Trespases where a Conviction and Satisfaction from one is a Discharge from all the Rest.

5thly, As Persons interested are utterly removed from being Evidence for want of Integrity, so on the other Side the voluntary Confession of the Party in Interest is reckoned the best Evidence; for if a Man's swearing for

Vent. 197.  
Skin. 404.  
Keb. 505.

2 Hawk. P. C.  
432.  
Kel. 17, 18.  
3 Keb. 136.

H. H. P. C. 306,  
307.  
Clayt. 115.  
See Mod. 283.  
8 Mod. 60.  
2 Ld. Raym.  
1007, 1411.  
Comyns 90.  
Vern. 230.  
Stra. 633.  
2 Stra. 1253.  
10 Mod. 193,  
194.  
12 Mod. 40, 72,  
339, 520.

Hard. 139, 140.



for his Interest can give no Credit, he must certainly give most Credit when he swears against it; but then this Confession must be voluntary and without Compulsion; for our Law in this differs from the Civil Law, that it will not force any Man to accuse himself; and in this we do certainly follow the Law of Nature, which commands every Man to endeavour his own Preservation; and therefore Pain and Force may compel Men to confess what is not the Truth of Facts, and consequently such extorted Confessions are not to be depended on.

Dalt. 415.  
Kel. 18, 19.  
L. E. 23. pl. 34.

THE Examination and Confession subscribed by an Offender before a Justice of the Peace, is good and sufficient against such Offender, but it doth not amount to a Conviction until the Party plead *Not Guilty* in open Court, because the Trial ought to be solemn and of Record that determines the Fate of Life and Death; but such Confession in Cases of Treason must be proved by two Witnesses, and such Confession so proved is only Evidence against the Party himself who made it, but cannot be made use of against any others whom in his Examination he confessed to be in the Treason.

2 Hawk. P. C.  
429.

Ibid.  
Kel. 55.  
H. H. P. C. 306.  
2 H. H. P. C.  
284, 285.  
2 Keb. 18, 19.  
Lev. 180.

A Witness examined before the Coroner, but upon the Trial is either dead, or so ill that he is not able to travel, if Oath be made of the Truth of this Fact, the Examination of such Witnesses so dead or unable to travel, may be read; but the Coroner must first make Oath that such Examinations are the same

same which were taken before him upon Oath, without any Addition or Alteration; because the Examinations are in these Cases the utmost Evidence that can be procured, the Examinant himself being prevented in coming by the Act of God.

AND much more so are such Examinations Evidence and to be read on the Trial when it can be proved on Oath, that the Witness is detained and kept back from appearing by the Means and Procurement of the Prisoner, for he shall never be admitted to shelter himself by such evil Practices on the Witness, that being to give him Advantage of his own Wrong.

Kel. 55.  
2 Hawk. P. C. 429.  
2 Keb. 19.  
H. P. C. 102, 263, 264, 265.  
St. Tri. 265.  
3 St. Tri. 8, 9.  
H. H. P. C. 304.  
2 H. H. P. C. 284, 285.  
Tri. per Pais 465.

So if Oath be made that a Witness examined before the Coroner has been sought for against the Trial, and though all Endeavours have been used, yet he cannot be found, in such Case his Examination may be read; because I suppose it is to be presumed that the Witness is dead when he cannot be found after the strictest Enquiry.

Kel. 55.  
2 Hawk. P. C. 430. sect. 7.  
say not; and see  
H. H. P. C. 305.

IN an Information against *Paine* for composing and publishing a Libel against the late Queen *Mary*, which was called her Epitaph. The Case was, that *Paine* wrote the Epitaph, but it was dictated to him by another, and that afterwards *Paine* put it into his Study, and by Mistake delivered it to *B.* instead of another Paper. It came at length through several Hands to the Magistrates, who sent

5 Mod. 163, 164, 165.  
L. Raym. 729.  
Carth. 405.  
Salk. 278, 281, 286.  
2 Salk. 555, 691.  
Lev. 180.  
Comb. 358.  
Holt 294.  
2 Jones 53.

for *B.* and examined him upon Oath, in the Absence of *Paine*. *B.* died before the Trial of *Paine*, which was at Bar, and the Court would not allow the Examinations of *B.* to be given in Evidence, because *Paine* was not present to cross-examine, and though 'tis Evidence in Indictments for Felony in such Case, by Force of 2 & 3 *Phil.* and *Mar. cap.* 10. yet 'tis not so in Informations for Misdemeanors in Civil Actions or Appeals of Murder.

6thly, THE second Sort of Persons excluded from Testimony for the want of Integrity are such as are stigmatiz'd.

Co. Lit. 6. b.  
156. a. 158. a.  
2 Str. 1148.  
2 Bulst. 154.  
2 St. Tri. 521  
to 524.  
Tri. per Pais ch. 9.  
Bract. lib. 4.  
c. 19. sect. 2.  
Fleta, lib. 4.  
c. 8. sect. 2.  
Fitz. Challenge  
41.  
Bro. Challenge  
15.  
2 Rol. Abr. 649.  
pl. 5.  
5 Mod. 16.  
Kel. 33. Raym. 32, 369. 2 Hawk. P. C. 395. sect. 52, 417. sect. 25, 432.  
sect. 19. 433. sect. 22, 23. H. P. C. 263. 33 H. 6, 55. pl. 45. 2 H. H. P. C.  
277.

Now there are several Crimes that so blemish, that the Party is ever afterwards unfit to be a Witness, as Treason, Felony\*, and every *Crimen falsi*, as Perjury, Forgery, and the like; and the Reason is very plain, because every plain and honest Man affirming the Truth of any Matter under the Sanction and Solemnities of an Oath, is intitled to Faith and Credit, so that under such Attestation the Fact is understood to be fully proved.

BUT where a Man is convicted of Falseness and other Crimes against the common Principles of Honesty and Humanity, his Oath is of no Weight because he hath not

\* Lev. 263. says not.      || *Falseness*.



the Credit of a Witness, and there is equal or greater Presumption against him than can be on his Behalf; for the Presumption is benign and humane to every Man produced as a Witness, that he will not falsify or prevaricate in Matters of such Importance as all Affairs of Justice are.

BUT where a Man is a notorious and publick Criminal, this Presumption fails him, and from thenceforth he is rather to be intended as a Man profligate and abandoned, than one under the Sentiments and Convictions of those Principles that teach Probity and Veracity; and consequently the producing such a Man is perfectly ineffectual, because the Credit of his Oath is overbalanced by the Stain of his Iniquity.

THE common Punishment that works the \**Crimen falsi* is being set on the Pillory; and therefore antiently they held the Law to be that no Man legally set on the Pillory could be a Witness; for they thought it a ridiculous Thing, and boding ill to a Cause when a Person thus stigmatized appeared in Court to attest any Thing; but the Rigour of this is reduced to Reason; for now it is held that unless a Man be put in the Pillory for \**Crimen falsi*, as for Perjury, Forgery, or the like, it is no Blemish to a Man's Attestation; for a Man may be pilloried for speaking loose and scandalous Words of the Government, which yet in doubtful and factious Times

Co. Lit. 6. b.  
5 Mod. 15, 74.  
Skin. 578.  
L. Raym. 39.  
Fortesc. 209.  
See 3 Lev. 426.  
Holt 753.  
12 Mod. 72.  
2 Salk. 461, 513,  
514, 534, 689,  
690, 691.  
Tri. per Pais 326.  
H. P. C. 263.

\* *Falsheid.*

ought

ought not to be taken as a Presumption against his common Credibility.

Raym. 370, 380.

Godb. 288.

Styl. 388.

Keyl. 38.

Vent. 349.

Tri. per Pais

323, 326, 475.

Rockwood's Tri.

44.

Skin. 578.

5 Mod. 15.

2 Sid. 51, 52.

12 Mod. 340.

Hob. 288, 292.

L. E. 37. pl. 10.

See Hob. 81.

ONE attainted of Felony or Cheating after a general Statute Pardon, was allowed to be good Witness, and so he is after Burning in the Hand, which amounts to a Statute Pardon, for by the Statute Pardon, every Body that is within that Pardon is received into the Society as a Person of Credit, and no Man can be punished in his Reputation when the publick Voice has discharged him.

2 Brownl. 47.

11 H. 4. 41. b.

2 Bulst. 154.

2 Sid. 51.

BUT whether the King's Pardon discharged him has been a Question, for some hold that the King's Pardon indeed takes away the Punishment, but doth not remove the Crime, and the Turpitude of the Crime always remains in the Mind, and is ever a Presumption against his Evidence.

Hob. 8.

Moor 863, 872.

2 Hawk. P. C.

395. sect. 48.

Vent. 349.

2 Sid. 222.

Danv. Abr. 163.

pl. 6.

Brownl. 10.

Ow. 150.

Rol. Abr. 87.

pl. 6.

Cro. Jac. 622.

Contra. 2 St.

Tri. 269.

3 St. Tri. 552, 553, 585, 596, 610. 4 St. Tri. 119. 5 Mod. 15. 16. Raym. 23,

369, 379. 2 H. H. P. C. 278. but the contrary is held in Bulst. 154. and 2 St. Tri.

520 to 524. Skin. 578, 579.

OTHERS hold the King's Pardon restores the Reputation, and the Loss of Reputation being Part of the Punishment, the King's Pardon that can take off the whole Punishment must by necessary Consequence restore the Reputation, and the King who is the great Preserver of the Life, Liberty and Estate of his Subject, is the best Judge of the Consequence of his Pardon.

So that if any Person guilty of those Crimes by which Credit is lost, be afterwards

wards pardoned, it must be supposed that he hath repented of his Fault, and hath returned to a better Mind, and therefore that his Evidence is not dangerous to the Life, <sup>per Holt.</sup> Liberty or Estate of the Subject; and therefore the Law is now held to be, that on Perjury at Common Law the Party pardoned may be a Witness, because the King has a Power to take off every Part of the Penalty, and so discern whether 'tis fit the Offender should be restored to Credibility; but if a <sup>2 Hawk. P. C. 432. sect. 19.</sup> Man be indicted of Perjury on the Statute, the King cannot Pardon, for the King is excluded and de vested of that Prerogative by the exprefs Words of the Statute.

AN Indictment of Perjury, and Verdict <sup>Raym. 32. 2 Sid. 51. Keb. 134.</sup> thereon, and no Judgment entered, can't be admitted to weaken the Credit of any Witness; for if there be no Judgment entered, the \* *Allegata* must be supposed defective, and a Man cannot be intended to make competent Proofs upon insufficient Allegations.

7thly, INFIDELS cannot be Witnesses, because they are under none of the Obligations <sup>2 Hawk. P. C. 434. sect. 26. Co. Lit. 6. b. but see H.H.P.C. 279. Eq. Abr. 397 to 412. 2 Stra. 1104.</sup> of our Religion, and therefore they are not under the Influence of the Oaths that we administer; and where the binding Force of an Oath ceases, the Reasons and Grounds of Belief are absolutely dissolved.

BUT *Jews* are daily allowed to be Witnesses because they can swear on the \* Old <sup>2 H.H.P.C. 272. 2 Keb. 314. Vern. 263.</sup> Testament which is Part of our Belief, therefore their Oaths do induce a Belief of the

I.

Fact,

\* *Allegations.*



Fact, which they attest ; but those are totally excluded by the Rules of the Civil Law, which seems a little partial in their ordinary Methods of Testimony, and which says, *\* Judæi et Hæretici contra Orthodoxos produci in Judicio Testes nequeunt.*

8thly, PERSONS EXCOMMUNICATE cannot be Witnesses, because by the Laws of the Holy Church such Persons are excluded from human Conversation. Nay her Laws go so far as to excommunicate those who converse with them, and consequently they cannot be admitted to receive any Questions from a Court of Justice ; besides they thought that those who were excluded out of the Church, were not under the Influence of any Religion.

2 Bulst. 155,  
156.

St. Tri. 268.

3 St. Tri. 425.

but Hawk. P. C.

23, 24. and

Crawley 216.  
contra.

Co. Lit. 6. b.

9thly, THE same Law holds place in relation to Popish Recusants, for they are by the 3 Jac. c. 5. in the same Condition with Persons excommunicated ; for when the Pope pretended to excommunicate Kings, it seemed proper to encounter his Faction with their own Weapons.

BUT Persons outlaw'd may be Witnesses, because they are punished in their Properties, and not in the Loss of their Reputation, and the Outlawry has no Manner of Influence upon their Credibility.

As to those who are excluded from Testimony by the Want of Skill and Discern-

*\* That neither a Jew or an Heretick can be produced in Judgment as a Witness against an Orthodox.*

ment, and they are *Ideots, Madmen, and Children* under the Age of common Knowledge; they are perfectly incapable of any Sense of Truth, and therefore are plainly excluded.

CHILDREN under the Age of 14 are not regularly admitted as Witnesses, and yet at 12 they are obliged to swear Allegiance in the Leet. There is no Time fix'd wherein they are to be excluded from Evidence, but the Reason and Sense of their Evidence is to appear from the Questions propounded to them, and their Answers to them.

H. P. C. 263.  
1 Inst. 6. b.  
H. H. P. C. 634,  
635.  
2 H. H. P. C.  
278, 284.  
2 Hawk. P. C.  
434. sect. 27.  
Brownl. 47.  
See Mosely 72.  
Str. 700.  
L. E. 276. pl. 33.  
Tri. per Pais 469.

WE come now to consider the whole Scale of Probability; and to compare the several Degrees of Evidence one with another. All Certainty (as we have shewn) arises from the Knowledge of a Man's own proper Senses by Intuition and comparing of his Ideas and Thoughts one with another.

## PROBABILITY.

### Proof of the Issue on whom.

PROBABILITY arises from the Agreement of any Thing with a Man's own Thoughts and Observations from the Testimony of others who have seen and heard it.

AND here it is first to be considered, that in all Courts of Justice the Affirmative ought to be proved, for it is sufficient barely to deny what is affirmed until the contrary be proved, for Words are but the Expressions

Dig. Lib. 2.  
Tit. Probat.

of Facts; and therefore when nothing is said to be done, nothing can be said to be proved; and this is a Rule both in the Common and Civil Law. The Civil Law says  
\**Probatio imponitur ei qui allegat, negantis autem per rerum naturam nulla est probatio.*

BUT in a Case where the Affirmative is proved, the other Side may contest it with opposite Proofs, and this is not properly the Proof of a Negative but the Proof of the same Proposition totally inconsistent with what is affirmed; and therefore where the General Issue is in the Negative, the Plaintiff must always begin with this Proof, because the Defendant cannot prove the Negative, and the Charge beginning by the Plaintiff, he must take it out of his Evidence; as if the Defendant be charged with a Trespass, he need only make a general Denial of the Fact, and if the Fact be proved, he can only prove a Proposition inconsistent with the Charge, and that he was at another Place at the Time when the Fact is supposed to be done, or the like.

BUT where the Law supposes the Matter contained in the Issue, there the opposite Party must be put into the Proof of it by a Negative; as in the Issue † *ne unques accouple in loyal Matrimony*, the Law will suppose the Affirmative without Proof, because the Law will not easily suppose any Person to be criminal, and therefore in this Case the Defendant must begin with the Negative.

\* The Proof lies on him who makes the Allegation, for it is against the Nature of Things to prove a Negative. † Never accoupled in lawfull.



IN a Writ of Right the Evidence must begin from the Tenant, if the Mife is thus joined, \* *Et Defend. se pon. in magn. Affiz. Dom. Reg. et petit Recognitionem fieri utrum ipse majus Jus habeat tenendi tenementa cu pertinent. sibi et heredibus suis ut tenens inde, sicut illa tenet: an præd querens habendi eadem Tenementa cum pertinen' ut illa superius pet.* so that in this case the Defendant's Issue is in the Affirmative, and therefore the Proof must begin from him.

1 Leon. 162.  
Hughes's Abr.  
26.  
Goldsb. 23.  
Co. Ent. 182.

THE Witness produced must first be examined on the Part of the Producer, and then the other Side may examine him; and this is a Regulation that naturally follows the true Order of Things, for it is proper first to enquire what a Witness can prove before you are to examine what hath not fallen under his Knowledge.

2 Bac. Abr. 300.  
Gilb. Hist. Chan.  
128.

THE Analogy of this Method is also observed in Equity; for if the Plaintiff takes out a Commission he shall have the Carriage of it; but if the Plaintiff will not take out a Commission the next Term after Issue joined, then the Defendant may take it out, and the Carriage belongs to him, for he that carries the Commission is first to produce and examine his Witnesses, and he that is first to produce the Witnesses is to have the Car-

\* And the Defendant puts himself upon the Great Assize of the Lord the King, and desires to know, whether he has the greater Right of holding the Tenements with the Appurtenances, to him and his Heirs as Tenant thereof, as he holds those: Or whether the aforesaid Plaintiff, of holding the same Tenements with the Appurtenances, as those above demanded.

riage of the Commission; and the first belongs to the Plaintiff to prove the Allegations of his Bill, and if he fails, the Defendant may prove his Answer.

THE first and lowest Proof is the Oath of one Witness only, and there is that Sanction and Reverence due to an Oath, that the Testimony of one Witness naturally obtains Credit, unless there be some Appearance of Probability to the contrary.

Now that which sets aside his Credit, and overthrows his Testimony, is in the Incredibility of the Fact, and the Repugnancy of his Evidence; for if the Fact be contrary to all Manner of Experience and Observation, 'tis too much to receive it upon the Oath of one Witness; or if what he says be contradictory, that removes him from all Credit, for Things totally opposite cannot receive Belief from the Attestation of any Man.

#### One Witness, Hearsay Evidence.

THAT which renders his Testimony doubtful is the Attestation of the several Circumstances, and yet no Proof of any one of those Circumstances to fall in with what he attests; this may render such a Witness (standing alone without any assistant Proof) to be very much suspected, and there must be great Confidence in the Integrity and Veracity of the Man to believe many Circumstances on one Man's single Testimony, where if it were true there might be a Multitude  
of

of concurrent Proofs to strengthen and confirm the Evidence.

ANOTHER Thing that would render his Testimony doubtful is, the not giving the Reasons and Causes of his Knowledge; for if a Man could give the Reasons and Causes of his Knowledge, and doth not, he is forsworn; because he is obliged to tell the whole Truth, and by consequence he is of no Credit; and that a Man should know any Thing, and not tell how he comes to know it, is incredible.

THE same may be said as to Persons who take upon them to remember Things long since transacted; for if the Matter be frivolous, they ought to tell the Causes of their Memory, otherwise the Memory is little to be credited; for they are rather to be supposed as rash Persons who take upon them to swear what they do not perfectly remember, than that they are really under the Awe or Conscience of an Oath, for then they would be able to tell the Reason and certain Marks of their Remembrance.

ANOTHER Thing that may render a Witness suspected, is in the Person himself; as if he who were Party to the Crime, swears for his own Safety or Indemnity, or be a Relation, or Friend to the Party, or the like; or be of a profligate or wicked Temper or Disposition; and the Weight of the Probability lies thus; if you think the Bias is so



strong upon him, as would incline a Man of his Disposition, Figure and Rank in the World to falsify, you are to disbelieve him; but if you think him a Man of that Credit and Veracity, that notwithstanding the Bias upon him, would yet maintain a Value for Truth, and is under the Force and Obligation of his Oath, he is to be believed.

THE Attestation of the Witness must be to what he knows, and not to that only which he hath heard, for a mere Hearsay is no Evidence; for it is his Knowledge that must direct the Court and Jury in the Judgment of the Fact, and not his mere Credulity, which is very uncertain and various in several Persons; for Testimony being but an Appeal to the Knowledge of another, if indeed he doth not know, he can be no Evidence: Besides, though a Person Testify what he hath heard upon Oath, yet the Person who spake it was not upon Oath; and if a Man had been in Court and said the same Thing and had not sworn it, he had not been believed in a Court of Justice; for all Credit being derived from Attestation and Evidence, it can rise no higher than the Fountain from whence it flows, and if the first Speech was without Oath, an Oath that there was such a Speech makes it no more than a bare speaking, and so of no Value in a Court of Justice, where all Things were determined under the Solemnities of an Oath; besides, nothing can be more uncertain than the loose and wandering Witnesses that are taken upon the  
the

the uncertain Reports of the Talk and Discourse of others.

BUT though Hearsay be not allowed as direct Evidence, yet it may be in Corroboration of a Witness's Testimony to shew that he affirmed the same Thing before on other Occasions, and that the Witness is still consistent with himself; for such Evidence is only in support of the Witness that gives in his Testimony upon Oath.

2 Hawk. P. C. 431.  
Holt 286.  
Skin. 402.  
Mod. 283.  
2 St. Tri. 325,  
328, 332, 333,  
414, 415, 529,  
761, 802, 803.  
3 St. Tri. 144,  
145, 209, 210,  
218, 222, 252,  
255, 423, 429.  
4 St. Tri. 33, 51, 52, 53.

ANOTHER Thing that derogates from the Credit of a Witness is, if upon Oath he affirmed directly contrary to what he asserts; then if the Matter be Civil, you may give in Evidence the criminal Proceedings, and swear what he gave Evidence at the Trial; and this takes from the Witness all Credibility, inasmuch as Contraries cannot be true.

### Two Witnesses.

2dly, THE second Degree of Credibility is from the Oaths of two several Witnesses, and is one Step higher than the Credibility that arises from the Oath of one Witness only; for here if they agree in every Circumstance, there must be two perjured, or it must be true what these Witnesses alledge and depose; but if upon their Examinations they disagree in Circumstances, then they fail in their Credit, because their Contradictions cannot be true.

BUT

BUT if the Matter they attest were transacted long ago, then this is capable of a fair Answer, for it may be supposed that the little Circumstances of Things might be forgotten, and it seems more like a Story laid and concerted beforehand, if in every minute and particular Circumstance they had both agreed and consented in Evidence.

THERE are some Cases in the Law where the full Evidence of two Witnesses is absolutely necessary; and that is,

2 Hawk. P. C.  
256.  
Braft. 354. b.

FIRST, where the Trial is by Witnesses only, as in the Case of a Summons in a real Action, for one Man's Affirming is but equal to another's Denying, and where there is no Jury to discern of the Credibility of Witnesses, there can be no Distinction made in the Credibility of their Evidence, for the Court doth not determine of the Preference in Credibility of one Man to another, for that must be left to the Determination of the Neighbourhood; therefore where a Summons is not made and proved by two Witnesses, the Defendant may wage his Law of Non-Summons.

Vern. 161.  
2 Vern. 283.  
3 Chan. Caf.  
123.  
2 Bac. Abr. 293.  
Gilb. Hist. Chan.  
139.  
Eq. Abr. 229.  
pl. 12.  
Har. Chan. Pract.  
351. 2 Har. Chan. Pract. 43.

2dly, THE second Case is in Chancery, and that is, where there is but one Witness contradicting the Answer; for there the Credibility is equal, unless it appears from the Nature and Face of the Fact, that the Answer is not to be believed, and the Course of the



## *The Law of Evidence.*

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the Court in such Case is to direct a Trial at Law to ascertain the Credibility of that Witness by a Jury, which is the common Standard on which the Credit of every *Englishman* is to stand and fall in all Events.

### Two Witnesses, contrary Proofs.

3dly, THE third Case where the Law requires two Witnesses is in the Case of High Treason, and this is not so much from the natural Justice of the Rule, that every Man's Allegiance is supposed till the contrary is proved, and the Negative of the Prisoner is equal to the Affirmative of one Witness, and therefore the Treason ought to be proved upon him by two Witnesses; for then the same would be good in Cases of Felony, where every Man's Honesty is presumed 'till the contrary is proved, and yet there it is sufficient to prove the contrary by one Witness; but the Law has appointed two Witnesses in this Case, because a Court Faction might in many Cases cut off their Enemies on such Articles without a sufficient Proof, and now by the late \*Statute two Witnesses are required to every overt Act of Treason.

Two Witnesses were required in the Case of Heresy, because this was tried by the Canon Law, and they followed the Rule of the *Mosaic* Law that required two Witnesses; besides, Heresy was formerly reckoned Treason, and therefore the Law did in such Cases require two Witnesses.

IN

2 Hawk. P. C.  
258. sect. 142.  
Sir T. Jones 233.  
3 Keble 68.  
H. P. C. 262.  
Bro. Coro. 220.

IN Treason for counterfeiting the common Coin, one Witness only is sufficient, because this does not relate to State Criminals, and there is no Danger of Oppression from a Court Faction.

2 Rol. Rep. 82.  
Styl. 207, 283.  
Cro. Car. 341,  
350, 470.  
Mod. Caf. in  
Law 4.  
2 Bulst. 341,  
348, 350, 355.

THERE are Cases where the Trial is by Witnesses, and yet one Witness suffices, and that is on the 18 *Eliz.* where the Mother of a Bastard Child is allowed Evidence to prove the reputed Father; and this is for Necessity, because otherwise such secret Lewdness would go totally unpunished; but then if a Woman charges two Persons she loses her Credibility, that she cannot charge either of them; but if she keeps constantly to the Charge of one only, it is a sufficient Proof, the Statute having set aside the Common Law in that Particular.

### The Weighing of Evidence.

WE come now to set the several Bounds of Credibility where there are contrary Proofs.

IN contrary Proofs, if Men's swearing can be reconciled, such Interpretation shall be put upon it as may make them agree, because every Body should be supposed to swear the Truth, and no Man shall be intended to swear a manifest Perjury; therefore that Construction shall be taken that would make them

them agree, rather than such whereby they must necessarily oppose each other.

ONE affirmative Witness countervails the Proof of several Negative, because the Affirmative may swear true, and the Negative also; for the Negatives may commonly be, that they know not of the Matter; the Affirmative swears that it is, and so the Affirmative may be true and the Negative also; for the Thing that the one swears may be true though the other knew nothing of the Matter; but where the Affirmative and Negative oppose each other in contradictory Propositions, the Evidence is to be weighed according to the Rules hereafter mentioned.

If there be two Witnesses against two, and no Preponderating as to their Number, they are to be weighed as to their Credit.

If a Witness be produced, and another be produced as to his Credit, his Credit is lessened in proportion to the Credit of the opposite Witness.

If a Witness be produced, and another be produced in Destruction of his Credit, and a Third be produced to support his Credit, the Credit of the first Witness is to be supported in proportion to the Credit of the first and third Witnesses to the second.

THE Credit of a Witness is to be judged from his State and Dignity in the World, for  
Men



Men of easy Circumstances are supposed more hardly induced to commit a manifest Perjury.

THEIR Credit is to be taken from their Principles, for Men atheistical and loose to Oaths are not of the same Credit as Men of good Manners and clear Conversation.

THEIR Credit is to be taken from their perfect Indifference to the Point in Question; for we rather suppose that the Favour and Regard to a Relation may draw a Man into Perjury, than that it should lie upon a Man wholly indifferent and unconcerned.

IF Witnesses are equal in Number and Credit, their Discernment must arise from their Skill, and will appear from the Reasons and Accounts they give of their Knowledge; for if one gives more plain and evident Marks and Signs of his Knowledge than the other, he is rather to find Credit; for the Memory of the other Side seems more faded, and therefore they appear more rash in taking it upon them, at least they do not appear so distinguishing in their Observations as those who give the Marks and Signs of their Memory.

2 Hawk. P. C.

434. sect. 29.

Cro. Car. 292.

2 Bulst. 147.

H. P. C. 264.

In Cases of Treason or Felony no Witnesses are sworn against the King; and the

See 3 Inst. 79. Tri. per Pais 472.

Reason

Reason seems to be because Men think it an Act of Piety to save the Life of a Man, and therefore may stretch a little beyond their Knowledge, and for that Reason are not admitted to hurt their Consciences by swearing; and therefore it seems hard to make any use of this Rule of Law to depreciate the Affirmation as if of less Value than an Oath; for the Party affirming declares he was willing to take his Oath and cannot be admitted; so if no Advantage be taken of the Authority of an Oath above that of a naked <sup>2</sup> Sid. 211. Affirmation, for that were to turn the Rules of Law into Oppression and Injury: Where there is only Judgment of Member, there Witnesses are to be admitted against the King, because the Reason of the Rule does not extend to such Cases.

By the now Law in Cases of Treason and <sup>1</sup> Ann. cap. 9. Felony, the Witnesses against the King are <sup>sect. 3.</sup> admitted to their Oaths, because this Rule was abused in the late Reigns to derive a Credibility on the King's Witnesses as being upon Oath, tho' contradicted by Men of better Credit upon their Words only.

Prefumptions violent and probable, \* *non est Factum.*

HAVING spoken of living and written <sup>Prefumption what.</sup> Evidence, we now come to *Prefumptions*; as it is defined by the Civilians, it is

\* *It is not his Deed.*

*Con-*

\* *Conjectura ex certo signo proveniens quæ alio adducto pro veritate habetur.* When the Fact itself cannot be proved, that which comes nearest to the Proof of the Fact is, the Proof of the Circumstances that necessarily and usually attend such Facts, and these are called Presumptions and not Proofs, for they stand instead of the Proofs of the Fact till the contrary be proved.

1 Inst. 6. b.  
2 Hawk. P. C.  
438.

THESE Presumptions are twofold, violent, or only probable; for the light and rash Presumptions weigh nothing, and therefore they cannot come under Consideration.

OF violent Presumption; and that is when Circumstances are proved that do necessarily attend the Fact.

Co. Lit. 6. b.  
S. P. C. 179.  
Letter A.  
Hawk. P. C. ch.  
45. sect. 10.

St. Tri. 181, 636. 2 St. Tri. 408. 3 St. Tri. 228, 229, 682, 689, 894 to 901, 928 to 930.

As if a Man be found suddenly dead in a Room, and another be found running out in Haste with a bloody Sword.

THIS is a violent Presumption that he is the Murderer, for the Blood, the Weapon, and the hasty Flight, are all the necessary Concomitants to such horrid Facts, and the next Proof to the Sight of the Fact itself, is the Proof of those Circumstances that do necessarily attend such Fact.

IF a Man gives a Receipt for the last Rent, the former is presumed to be paid, because

\* *A Conjecture arising from a Certainty, which supported by another Certainty, is esteemed Truth.*



a Man is supposed first to receive and take in the Debts of the longest Standing; especially if the Receipt be in full of all Demands; then 'tis plain there were no Debts standing out; and if this be under Hand and Seal, the Presumption is so violent, that the Law admits of no Proof to the contrary; because that were to let a Man invalidate his own Deed, which our Law doth not permit; for here, though the Payment of the Money is not proved, yet the Acquittance is proved, which could not be without such Payment.

EVERY Presumption is more or less violent according as the several Circumstances sworn do more or less usually accompany the Fact to be proved.

If there be an old Deed, and Possession has always gone along with that Deed, 'tis a violent Presumption of a Right though the Livery be not actually proved; for though the Fact of Livery is not proved, yet the Circumstances usually attending such Facts are really proved, that is, the old Deed and the consequent Possession.

### I S S U E S.

WE come now to the several Issues in each Particular Action; and first to the Issue of \* *Non est Factum*, and we have already considered what is the legal Consequence of Interlineations, Rasures, and the breaking off Seals from Deeds.

\* *It is not his Deed.*

M

AND

AND now we are to consider what other Evidence is proper upon this Issue.

5 Co. 119. b.  
Cro. El. 54.  
Anderf. 4.  
Dy. 163, 167.  
2 Leon. 110,  
111.  
Bendl. 75.  
Danv. Abr. 514.  
pl. 1.

If an Obligation is delivered to the Use of another, and he disagrees to it, by this the Obligation has no Force, and he can never agree to it afterwards, and therefore this is no Deed, and may be given in Evidence on \* *Non est Factum*.

\* *Non est Factum*.

2 Rol. Abr. 683.  
pl. 8.  
See 6 Mod. 217.  
Ld. Raym. 354,  
356, 357.  
Sav. 71.  
Salk. 274.

If a Man seals an Obligation and commands another to keep it till certain Conditions are performed, and the Bond is delivered to the Obligee before they are performed, this could never be his Bond 'till those Conditions were performed, and therefore this special Matter may be given in Evidence to prove \* *Non est Factum*.

2 Rol. Abr. 677.  
pl. 24.

2 Co. 4, 5.

AND upon \* *Non est Factum*, if the Witnesses prove Delivery at another Place than where it bears Date, it doth not warrant the Issue; for this is a Testimony contrary to the plain Words of the Deed, and therefore no Proof of the Deed in question. *Quere tamen*, for the Place where the Deed was made is no material Part of the Deed.

5 Co. 119.  
Cro. Ja. 152.  
Dy. 310.  
2 Rol. Abr. 677.  
pl. 20.

IN Debt against two, and \* *Non est Factum* pleaded, it is proved the Deed of one of them and not of the other, the Issue is maintain'd, for a joint Action charges each with

\* *It is not his Deed.*

the

the whole Debt, and when the Issue is found that it is the Deed of one, it amounts to the total Cause of Complaint alledged in the Declaration against that Person, and consequently the Plaintiff ought to recover against him since he is proved to be his Debtor.

UPON \* *Non est Factum* you may give, Not letter'd, in Evidence; for when the Person who delivered the Deed is unlearned, and the Deed is read and expounded to him in another Sense than that which the Deed really contains, then did not the Party agree to the written Deed, 'tis not the Expression of his Mind, nor to be accounted his Deed.

It has been a Question whether § *Riens passa per le Fait*, may be given in Evidence upon \* *Non est Factum*; for on the one Side it may be said that on \* *Non est Factum* the Operation of the Deed is not in Debate, but whether the Party sign'd, seal'd and delivered the Contract alledged in the Declaration; so that if the essential Part of that Sort of Contract be proved, they take it to be a Proof of the Issue; others have said that where a Deed is of no Effect to pass any Right, it is utterly void and of no Effect, as if a Man accepts a Lease of his own Lands by Deed Poll; and where a Contract is void and of no Effect, it is reputed no Contract at all.

A Man was bound to *Randolph*, and the Plaintiff declares of an Obligation to *Ralph*, upon \* *Non est Factum* pleaded, it can't be

\* It is not his Deed. § That nothing passed by the Deed.

M 2

found



Post. 169, 170.

found the Deed to *Randolph*, for *Randolph* and *Ralph* are different Christian Names, and cannot denote the same Persons; so 'tis of *Edward* and *Edmund*.

9 H. 6. 60.

If a Deed be enrolled you shall not plead \* *Non est Factum*, for by the Acknowledgment of the Party it appears to be the Party's Deed; for there is that Credit given to the Transactions in a Court of Justice, that the Party shall never say he did not acknowledge it; so that though this Deed be no Record (that is no Act of the Court in the Decision of Right and Wrong) yet it is in Court, and so far to be credited that the Party shall never deny the being of such a Deed; but the Party may avoid the Operation of such a Deed by pleading † *Riens passa per le Fait*.

Style 78.  
2 Co. 9.

If a Man was blind and the Deed misread to him, he may plead \* *Non est Factum*, and such Evidence will maintain the Issue, for then 'tis indeed none of his Contract.

Rol. Rep. 188.  
20 Ed. 4, 1. a.

A Stranger to a Deed shall not plead a general or special \* *Non est Factum*, as that the Seal is severed from the Deed, and § *Issint*, &c. but he ought to plead † *Riens passa per le Fait*, for a Man ought to try the Validity of a Stranger's Deeds no further than they regard his own Interest, and therefore he cannot deny the being of such a Deed, but only the Operation of it as to himself.

\* It is not his Deed. † That nothing passed by Virtue of the Deed.  
§ So.

THE Plaintiff declares of a Bond dated the 24th upon \* *Non est Factum*, the Jury find a Bond dated the 24th and delivered the 27th, this is a finding of the Deed declared.

Style 414.  
2 Co. 4.  
Cro Jac. 136.

UPON \* *Non est Factum* a Man cannot give Infancy in Evidence, but he must plead it, and conclude to the Court with an † *Hoc paratus est verificare*, for the Infant is in Law reputed to have a contracting Power for his own Benefit, and to bind all the personal Estate which is his own, and therefore has Power to avoid his Agreements or not; and therefore this cannot be said to be a void Agreement, and so the Issue is not proved by this Evidence, since the Issue denies any Agreement at all.

5 Co. 119.  
L. Raym. 315.  
Plowd. 668.  
Moor 43.  
3 Keb. 228.

BUT Coverture may be given in Evidence on \* *Non est Factum*, for the Wife has no Will of her own, but is subject entirely to the Power of the Husband, and he is to make all Agreements that bind the Personal Estate of the Husband; and therefore at the Time of the making it is no Deed at all.

4 H. 4. 30.  
Tri. per Pais.  
376 (467).

A Man cannot give Durefs in Evidence on \* *Non est Factum*, for the only Point in Issue and the Controversy on \* *Non est Factum* is whether the Deed declared on be the Act of the Party; so that when the Act is proved to be done, the whole Matter denied by the Defendant is proved to the Jury; but if there be any other Circumstances to destroy

5 Co. 119.  
Plowd. 66.

\* It is not his Deed. † This he is ready to verify.

M 3

that

that Act and avoid its binding Force, that must be shew'd to the Court, that the Court may judge, and not the Jury, whether they are sufficient to avoid that Deed.

5 Co. 119.

Hob. 166.

3 Co. 59.

Al. 58.

WHERE an Act of Parliament declares a Bond to be void, as Sheriffs Bonds against the Statute of 23 H. 6. and usurious Bonds against the Statute of 13 Eliz. yet this Matter cannot be given in Evidence on \* *Non est Factum*, but must be specially pleaded and shewn to the Court to judge of; for where a Statute declares a solemn Act to be void, it is not to be construed † *ipso facto* void, but to be voided upon Appearance to the Court to be within the Circumstances mentioned in the Statute; for it were preposterous that the Statute should be referred to the Jury that are not Judges of the Law.

2 H. 7. 15.  
Moor 43.

IF the Deed be only voidable, the general Rule is, that you must conclude to the Court with Judgment, § *si actio*, because the Court may judge whether you have offered such Matter as will amount to the avoiding of the Deed; and the Law is the same whether voidable at Common Law, or void by Act of Parliament.

2 H. 7. 15.

5 Co. 119.

WHERE the Controversy relates to the Signing, Sealing and Delivery of the Deed by the Defendant, he pleads \* *Non est Factum* generally; but antiently where the Deed was signed, sealed and delivered, yet was

\* It is not his Deed. † Instantly. § Whether the Action.



originally void by Matter \* *dehors*, as by Reason of Coverture, or because the Party had no Right in the Thing transferred by the Deed, or became void afterwards by Rasure, Interlineation or Addition, there the Defendant must have pleaded the Matter specially, and concluded † *Iffint non est Factum*; and this was, that the Plaintiff might be apprised to the Point of Defence; for since there are so many various Ways to make the Deed null and void, if all of them might be given in Evidence upon the § *Non est Factum* generally pleaded, they thought that the Plaintiff could never come prepared to falsify the Evidence of the Defendant, and so might be liable to a Surprize when he had Right; and therefore they thought that Notice must be given of such foreign Matters as these, if you would have them given in Evidence.

ANOTHER Reason why this special Conclusion with an † *Iffint non est Factum* was anciently referred to the Court was this, because it generally contains Matter of Law, which if it had arisen upon Proof of the Fact, is to be referred back to the Court by Demurrer to Evidence or special Verdict, and therefore it is very reasonable, that the Doubt of Law should be offered to the Court originally; but at this Day the Law is otherwise.

If a Man pleads, *Delivered as an Escrow*, and concludes specially † *Iffint non est Factum*, the general Way is to put it to the Jury,

3 Keb. 142.  
Brown's Anal.  
16.

12 Vin. 181. pl. 4.  
Bro. General  
Issue pl. 26.

\* Outwardly. † So not his Deed. § Not his Deed.

M 4

because

because it is in Effect to say there was no Deed at all; but they may put it to the Court, by an \**Hoc paratus est verificare*, because the Court judge whether he exhibited such Matter as will make the Deed of no Effect at all, and therefore such a Pleading as this is not apprehended to be vicious.

Noy 112.  
Moor 30.  
Dalif. 105.

BUT if you plead a breaking of the Seal, razing or any Addition after Delivery, you may conclude † *Iffint non est Factum*, but the better Pleading has been reckoned to conclude to the Court with Judgment, § *si actio*, because the Deed is not so apparently void, but that it seems necessary to put it to the Court, whether those are Circumstances that would avoid it, or he must give it in Evidence on ‖ *Non est Factum*, for it disproves the Deed.

Sid. 450.  
Vent. 77.  
2 Keb. 333.

IF a Man pleads that the Obligation was made to another, and not to the Plaintiff, this is ill, because it amounts to the general Issue of ‖ *Non est Factum*.

Cro. El. 800.

IF a Man pleads \*\* *Quod factum prædict.* was made and delivered without Date, and that the Plaintiff added a Date, and † *Iffint non est Factum*, this is not good, for at the Beginning of the Plea, he confesses it to be his Deed, and to be made and delivered by him, which at the latter End he denies, and so it is repugnant.

IF a Man confesses the Obligation, and pleads an Acquittance, he cannot conclude

\* This he is ready to verify. † So not his Deed. § Whether the Action. ‖ Not his Deed. \*\* That the Deed aforesaid.

*Iffint*

\* *Issint non est Factum*, but Judgment † *si actio*, for it is really his Deed, tho' it be avoided by a contrary Agreement, which must be exhibited to the Court to judge of, so that the Validity and Essence of a lawful Contract may be seen by the Court, before the Truth of the Fact be called in Question before the Jury.

A Man declares of an Obligation made to himself, and on § *Non est Factum* pleaded, the Jury find an Obligation made to another of the same Name, this warrants the Issue, for the only Question in this Action is, whether the Deed profered in the Declaration be the Deed of the Defendant; for if it were his Deed, sealed and delivered to another than the Plaintiff in the Action, he ought to confess the Truth of the Deed, and avoid it by pleading the special Matter.

16 H. 7. 7.  
Sid. 459.

THE same Law if they find the Obligation made to the Plaintiff and another, and that he brought the Action as Survivor; but here the Defendant might demand Oyer and Demur to it.

Al. 41.  
Styl. 78.

BUT where a wrong Party is sued, that bears the Name of the Obligor, he may plead § *Non est Factum*, for then it is not any Deed at all of his.

THE Plaintiff brings an Action against W. S. on § *Non est Factum* the Jury find a special Verdict, that W. S. entered into an Obligation

Dyer 279. pl. 9.  
Cro. Jac. 558,  
640.  
Ow. 43.

\* So not his Deed. † Whether the Action. § Not his Deed.

gation



Perk. 17.  
Moor 897.  
Antea 163, 164.  
Rel. Abr. 872.

gation to the Plaintiff, by the Name of T. S. this is found for the Defendant, because the Jury do not find it the Obligation of W. S. For the Jury cannot take upon them any Fact contrary to the Specialty put in Issue, and by the Specialty it appears to be the Deed of T. S.

35 H. 6. 9. b.

If the Defendant pleads \* *Non est Factum*, and further Demurs upon the Obligation, the Demurrer is void, because no Man is allowed a double Plea, to alledge the Fact to be false, and that the Charge is contrary to Law, but he must take one Plea that he thinks most advantageous; for if he should be allowed several Ways of Defence, it would multiply Contention infinitely, as we find by the Practice of the *Chancery*, where they judge upon innumerable Circumstances, and never reduce the whole Weight of the whole Cause to one Issue.

Latch 125.

DEBT against G. B. Executor of J. B. on a Bond made by J. B. the Defendant pleads † *Quod Scriptum prædict. non est Factum suum*, whereas he ought to have said, § *Non est Factum J. B.* After a Verdict this was held to be good, because (his) shall be intended his, that the Plaintiff declares on, and that was the Bond of the Testator, since the Jury in their Verdict have confirmed the Relation to that Bond in the Declaration.

21 Co. 26, 27.

ON \* *Non est Factum* generally pleaded, a Man may give the special Matter in Evi-

\* It is not his Deed. † That the Writing aforesaid is not his Deed. § It is not the Deed of.

dence,

dence, as Razure, Interlining or Addition, for it is not necessary to plead any Matter or Thing specially, but what is exhibited to the Court, to judge of, and such Plea concludes with an Averment, *That you are prepared to verify*; and the Reason is, because it seems incongruous, to make that absolutely necessary to be shewn to the Court, which is shewn to them in vain, and that doth not come under their Judgment; now when they shew that the Deed is void, you shew that it is none at all, which amounts to the general Issue of \* *Non est Factum*, and therefore you must conclude not to the Court, but to the Country; from whence it follows, that it cannot be absolutely necessary to set it out to the Court, since it is concluding to the Jury, and not offered for their Judgment and Determination.

IN Debt on Obligation, the Defendant <sup>1 Rol. Abr. 683.</sup> pleads generally \* *Non est Factum*, he may give in Evidence the special Matter to prove that it was not his Deed, as that he sealed it, and commanded *B.* to keep it, 'till Conditions performed, and that the Plaintiff took it before the Conditions were performed.

IF two Men are jointly bound in an Obligation, and one only is impleaded, on \* *Non est Factum*, he cannot give this in Evidence, <sup>Sid. 420.  
Co. Lit. 283. 3.  
5 Co. 119.</sup> for he did seal and deliver the Deed, and so he hath contracted though not solely, and this ought to be pleaded in Abatement,

\* *It is not his Deed.*

other-

otherwise it shall be intended that he is a lawful Defendant, having admitted himself to be so, by the Pleading in Bar to the Debt, and the other shall be intended not to have sealed, or if he did, that he is dead, and the Covenant survives.

3 Vent. 151.

BUT if an Assumpsit was alledged to be made by one, and upon Issue they prove a Contract made by two, this seems not to maintain the Declaration; and the Reason of the Difference is, that upon every Contract with Solemnity, there is a Profert made of it to the Court, so that it appears to be the same in the Declaration and in the Evidence, and if there were a material Variance, it might be taken Advantage of by the Demurrer; but where there is no Profert made of the Contract, there the Defendant doth not know what the Plaintiff intends to prove, and therefore he must prove the same Contract that was alledged in the Declaration, without any substantial Variance, and nothing can be inferred from the Defendant's pleading in Bar to this sole Contract, for he did not know 'till he comes upon the Trial, that the Plaintiff intends to charge him with a Joint Contract.

Moor 43;

IN Debt upon an Obligation, the Defendant pleads that there was a Schedule annexed to this Obligation, the which Schedule is disannexed to the Obligation, and \* *Issint non est Factum*, this is not good, for here he confesses the Deed, and avoids it by saying

\* *So not his Deed.*



not that the Deed itself is altered, for then it were not his Deed, but by saying that the Appendices relating to the Deed are altered, which confesses the Deed, and therefore cannot in the same Breath be denied; but this is a good Plea, if he had concluded to the Court with Judgment \* *si actio*, for it allows that there was such a Deed, but at the same Time declines the Plaintiff's Action by saying that he himself altered the Appendices thereunto relating.

BUT on † *Non est Factum*, if the Seal were broken off after Plea pleaded, it is the Deed of the Party.

§ *Solvit ad Diem.*

2dly, THE second Issue is that of § *Solvit ad Diem*; and to explain this Issue, it is to be considered, that when any Contract is founded on a Specialty, it cannot be dissolved but by Specialty; for every Contract must be dissolved by the same Solemnity and Notoriety that it was made; otherwise there is more Evidence to suppose the Continuance of the Contract, than the Dissolution; therefore on a single Bill you cannot plead a naked Payment without a Discharge in Writing, because there is a solemn Contract by which you are charged, and there cannot be any Discharge but by Matter of equal Solemnity; but you may plead Payment at the Day, because the Condition is contained in the very Contract itself, and upon that Mat-

\* *Whether the Action.* † *It is not his Deed.* § *Payment at the Day.*

ter of Fact, the Force of the Contract depends, and when you discharge yourself by pleading the Act required in the Condition, then is the Contract dissolved by something arising out of the Contract itself, which is the same Thing as if it were dissolved by a Contract of equal Solemnity.

Sid. 41.

WHERE I am bound to pay a Sum of Money to two, Payment to any of them is sufficient, because a Man cannot pay the same to two several Persons.

3 Keb. 471.  
Eq. Abr. 145.  
pl. 3.  
Vide Post.  
Moor 68. pl. 183.  
Holt 46.  
Toth. 273.

PAYMENT to a Scrivener, especially if he has the Bond in his Custody, is good; for the Payment to another for me, is a Payment to me, and he appears to be deputed to receive this Money, by having the Bond in his Custody.

CONDITION to pay Money to the Obligee, and the Parishioners of *Dale* at such a Day, Payment to the Obligee and two of the Parishioners is well enough, for this answers the Condition since two is the plural Number.

2 Ed. 3. 3.

CONDITION to pay ten Pounds to *A.* 'tis a good Performance to pay it to his Deputy,  
\* *nam Quicquid agitur per alium agitur per se.*

Lit. Rep. 54.  
Hetley 46.  
2 Keb. 249.

THE Payment to the Scrivener who has the Bond is † *prima Facie* a good Payment, because he appears to be intrusted to receive it; and therefore on such Evidence the Mo-

\* For whatever is done by another, is done by oneself.

† In appearance.

ney

ney is presumed to have come to the Party's Hands; but if it be proved on the other Side, that the Scrivener broke, so that the Money was never paid to the Plaintiff, this is no Payment at all to the Plaintiff; but where a Man gets Judgment, Payment to his Attorney is well enough, for he is not only intrusted, and put in the Place of the Creditor to get Judgment, but to take the Effect of that Judgment, and since the Attorney might take out Execution, he may take the Payment of the Money instead of the Execution, therefore the Debtor ought to be indemnified by the Law.

THE Condition was to pay Money at a certain Day and Place, and Payment was made before the Day, and an Acquittance given in Evidence; this was adjudged, not to maintain the Issue, because the precise Day is Parcel of the Issue; but it is there said they ought to plead the Payment specially, and the Acceptance of the Plaintiff\*; but where the Solvendum of a Bond is Future, a Man may plead Payment before the Day, and that nothing is in Arrear, because the Day is gone, and taken away by such Payment, but the Condition is not actually performed in the other Case.

Moor 47.  
Cro. Eliz. 142.  
Dy. 222.  
contra.  
Stra. 622.  
2 Stra. 954.  
Hardw. 235.

\* But now by Stat. 4 An. c. 16. sect. 12. where an Action of Debt is brought upon any Bond which hath a Condition or Defeazance to make void the same upon Payment of a less Sum at a Day and Place certain, if the Obligor, his Heirs, Executors or Administrators have, before the Action brought, paid to the Obligee, his Executors or Administrators, the Principal and Interest due by the Defeazance or Condition of such Bond, tho' such Payment was not made strictly according to the Condition or Defeazance; yet it shall and may nevertheless be pleaded in Bar of such Action, and shall be as effectual a Bar thereof as if the Money had been paid at the Day and Place according to the Condition or Defeazance, and had been so pleaded.



Cro. Eliz. 884.  
 5 H. 7. 41.  
 Dr. and Stud.  
 Dial. 1st. chap.  
 12.

DEBT on an Obligation of two hundred Pounds, Defendant pleaded that after the Day of the Writ purchased, viz. such a Day, *\* apud, &c.* he paid to the Plaintiff sixty Pounds, Parcel thereof which he received; Judgment *† de Breui, &c.* upon special Demurrer, adjudged for the Plaintiff, because the Defendant did not shew any Acquittance or Release, proving this Payment, which if he had done, the Writ would have abated for the Whole; but since he did not produce any Deed of Acquittance, his Plea shall be no more than a naked Averment; which can never overthrow any Obligation which is of an higher Nature, and consequently cannot abate the Writ which is founded on it.

Dr. 25. b. 51.  
 Micor 12.

IN Debt on a single Bond; Payment without Acquittance is no Plea; for the Bond being a Contract with Solemnity, cannot be avoided by a bare Averment which is inferiour in its Nature to it; otherwise in Debt on an Obligation with Condition; for there by the Nature of the Contract and the exprefs Agreement of the Parties, Performance of the Condition is to be a full Discharge of the Bond; so that if the Performance be pleaded and proved, 'tis a full Bar without producing any Deed of equal Solemnity with the Bond to overthrow it.

5 Co. 117. b.

IN Debt on an Obligation of ten Pounds, the Defendant pleads that one H. was jointly bound with him, to whom the Plaintiff had

*\* At. † Of the Writ.*

made

made an Acquittance bearing Date before the Bond, but delivered after it, in which he acknowledged the Payment of twenty Shillings in full Satisfaction of the ten Pounds, and adjudged a good Bar; for if a Man acknowledges himself satisfied by Deed, it is good against him, though he has received nothing, since he shall not be allowed to contradict what appears under his Hand and Seal.

CONDITION to pay seventy Pounds, viz. Cro. El. 281.  
thirty-five Pounds at one Day, and thirty-five 2 Danv. Abr.  
Pounds at another Day at the Temple Church; 250. pl. 14.  
the Defendant pleads Payment of the seventy Pounds at Ludlow, \* *secundum formam et effectum*; and held good; † *reddendo singula singulis*, as if he had pleaded Payment of the several Sums at the several Days.

DEBT on a Bond by a Bishop, the Defen- 22 Ed. 4. 25. 2.  
dant pleads he paid the Money at the Day, Bro. title Condi-  
to J. S. Bailiff of the Plaintiff, and by his tion pl. 181.  
Command, and avers that this came to the Use of the Bishop; this Averment makes the Plea double, for if the Bailiff receives this by Command from the Bishop, though it does not come to the Bishop's Use, yet 'tis a sufficient Discharge to the Defendant.

Quere, whether a double Plea, for, that it came to the Use of the Bishop, seems to be a Surplusage.

DEBT upon a Bond, the Case was, that the Cro. El. 68.  
Defendant did owe to the Plaintiff a certain 2 Str. 1194.

\* According to the Form and Effect. † By giving each particular Day its Sum.

N

Sum

Sum of Money by Bond, and certain Money for Wares sold, and at the Day of Payment on the Bond, he tendered the Money according to the Bond, which the Plaintiff accepted, and said it should be for the Book Debt, and not for the Bond Debt, but the Defendant said he paid it on his Bond, and no otherwise; but the Plaintiff cross'd his Book, and brought Debt on the Bond; and adjudged against him, for the Defendant is to appoint the Manner of Payment.

Cro. Jac. 583.  
Danv. Abr. 353.  
pl. 2.

IN Debt on a Bond of two hundred Pounds, conditioned to pay one hundred and five Pounds, &c. the Defendant pleads Payment of the aforesaid Sum of one hundred Pounds at the Day; the Plaintiff replies, \* *quod non solvit præd.* one hundred and five Pounds, † *et hoc petit*, &c. and it was found for the Plaintiff, and Judgment given for him, which was afterwards reversed, because the Plaintiff and Defendant do not join in a Point, and therefore there is no Issue nor Verdict upon it.

Cro. Jac. 549.  
2 Rol. Rep. 135.  
Palm. 74.

BUT where the Defendant pleads, to Debt on Bond, Payment of fifty Pounds on the 14th of June, &c. and the Plaintiff replies that he did not pay the fifty Pounds the said 14th of August § *supradict quas ei ad eund. diem solvisse debuisset*; and Verdict found that he did not pay it the 14th of June, yet it is no Error, for the Defendant's Plea was according to the Condition, and the Plaintiff's Replication || *quod non solvit* the said 14th Day,

\* That he did not pay the aforesaid. † And this he prays, &c.  
§ Aforesaid, which he ought to have paid him the same Day.  
|| That he did not pay.



was good, for the Word (*August*) was superfluous, and \* *prædict.* 14th *Die*, without more, had been sufficient; but in the former Case there was another Sum in the Plea of the Defendant than was in the Condition, and another Sum in the Replication than was in the Bar, so that there could be no Issue.

IN Debt on an Obligation the Defendant pleads † *Solvit ad diem*, & *de hoc ponit se*, &c. & *prædict. querens similiter*; and in Error 'twas insisted on that the Defendant ought to have concluded his Bar with § *et hoc paratus est verificare*, and then the Plaintiff ought to have replied, || *Non solvit et hoc pet.* &c. so there had been an Affirmative and Negative; but rejected, for there is an Issue, and the Error is only in the Formality of joining it, so that is aided by the Statute of Jeofails.

Cro. Car. 316.  
Danv. Abr. 354.  
pl. 1.  
2 Sid. 215.  
Keb. 759, 766.  
Raym. 93.

ON this Plea \*\* *Solvit ad Diem* Payment must be proved on the very Day the Money is payable by the Bond, because the Penalty is forfeited, and the Bond made absolute at Law if the Money be not paid the very Day, though it should be paid the Day after the Day it is made payable by the Condition.

But this aided by the Statute for the Amendment of the Law. See before 123.

†† *Non assumpsit infra sex Annos.*

WE now come to the Issue of †† *Non assumpsit infra sex Annos.*

\* The *aforesaid* 14th Day. † That he paid at the Day, and of this he puts himself, &c. and the *aforesaid* Plaintiff doth the like. § And this he is ready to verify. || That he did not pay, and this he prays, &c. \*\* That he paid at the Day. †† That he did not undertake within six Years.

March 151, 155.

Styl. 109, 214,

231.

Hutt. 100.

Hetl. 140.

Carth. 136.

Lutw. 260.

Saund. 37, 38.

Mod. 89, 245,

269.

2 Mod. 212.

3 Mod. 311.

4 Mod. 105.

Show. 341.

2 Show. 126.

Cro. Car. 115.

141, 160, 245,

295, 333, 381,

405, 519.

Vern. 456.

2 Vern. 694, 695.

2 Vent. 185.

3 Lev. 245, 283.

Salk. 28.

11 Mod. 37.

6 Mod. 309, 310.

2 Salk. 421, 424.

THIS Issue is founded on the Statute of 21 Jac. c. 16. and lies in all Actions on the Case, and the Reason of the Statute is, because the Debt must be supposed to be paid if the Action be not brought within that Compass, for Witnesses may die or change their Abode, so that it may be a very hard Thing to prove the Payment of the Debt; and since the Law Wager is avoided by giving the Assumpsit, it is convenient to limit a Time in which if the Debt was not demanded, Payment should be supposed.

THIS Issue doth not lye on any Assumpsit between Merchant and Merchant, for they may have occasion to trust one another much longer, and therefore these Persons are excepted by the Statute.

Modus Inrandi

28, 29.

Lib. Placitandi

61.

THIS Issue is pleaded either by Way of Negation to the Declaration, and then it is pleaded, that the Defendant \* *venit et defendit vim et injur. quando, &c. et dicit quod ipse non assumpsit super se ad aliquod Tempus infra sex Annos ante Diem impetrationis brevis originalis, et de hoc ponit, &c.* or else they may plead it by Way of Bar, and then it is, † *et dicit quod prædict, querens Actionem suam prædict. inde versus eum habere non debet, quia dicit*

\* Comes, and defends the Force and Injury, when, &c. and says, that he did not assume upon himself, at any Time within six Years before the Day of obtaining the original Writ; and of this he puts himself, &c.

† And says, that the aforesaid Plaintiff ought not to have his Action aforesaid hereof against him, because he says, that he did not undertake, &c. and this he is ready to verify, &c.

quod

*quod ipse non assumpsit, &c. et hoc paratus est verificare, &c.* and the Reason why either Way of Pleading is allowed, is because that it is a direct Negative to the Plaintiff's Declaration in the Gift of the Action, and therefore it may properly conclude to the Issue, there being a direct Negative contrary to the Plaintiff's Affirmation; and because it exhibits a Statute Law to the Court in Discharge of the Plaintiff's Demand, it may be pleaded in Bar.

ON the Issue of \* *Non assumpsit infra sex Annos* the Defendant proves a Debt of nine Pounds ten Years ago, and an Acknowledgment of the Debt within six Years, and an Offer to pay five Pounds for the whole; the Plaintiff was nonsuit, for the Acknowledgment of the Debt is no more than he does by his Plea; but there must be a new Promise of the Debt within six Years to make the Action hold; and here the Promise or Offer to pay five Pounds, gives no Action for the nine Pounds.

BUT the Confession of the Debt within the Time is Evidence of a new Promise (though it is not of itself a new Promise) if found by special Verdict; for that may be Evidence of a new Promise to a Jury to induce them to believe there was such a Promise, which when specially found to the Court will not amount to a Promise in express Words.

224, 557, 577, 578. Gilb. Hist. C. P. 54.

DECLARATION in Assumpsit by the Executor for Monies due to his Testator, and

\* He did not undertake within six Years.

Tri. per Pais  
6th Edit. 371.  
L. E. 169. pl. 53.

2 Vent. 152.  
L. E. 170. pl. 56.

2 Vent. 152.  
L. Raym. 389,  
422.  
Carth. 470, 471.  
6 Mod. 309, 310.  
5 Mod. 425, 426.  
2 Show. 126.  
Salk. 28, 29.  
L. E. 169. pl. 55.  
Ch. Pre. 385,  
386.  
11 Mod. 37.  
12 Mod. 223,  
224, 557, 577, 578. Gilb. Hist. C. P. 54.

Carth. 471.  
5 Mod. 425.  
See 2 L. Raym.  
1101.  
11 Mod. 37.



the Assumpsit Part is laid to the Testator in his Life Time, on \* *Non assumpsit infra sex Annos*, an Assumpsit was proved to the Testator eight Years ago, and the Promise renewed to the Executor within the six Years, and allowed to maintain the Issue, though the Assumpsit in the Declaration was laid to the Testator only; for the Assumpsit to the Executor, the Representative of the Testator, is an Assumpsit to the Testator himself, and maintains the Issue.

2 Vent. 151.  
Tri. per Pais  
6th Edit. 374,  
375.  
L. E. 170. pl. 56.

AN † *Indebitatus Assumpsit* against four, they plead § *Non assumpser' infra sex Annos*, and the Evidence is, that they all assumed out of the Compass of the six Years, and that one assumed within the six Years; and the Verdict found that one did assume, and disallowed; for he must sue them all, else he would vary from his original Contract, and cannot prove they all assumed within six Years, and consequently cannot prove the Contract in the Issue.

YET quere, whether he ought not to sue one only, it being a new Contract on the old Consideration.

### || *Non Assumpsit.*

GENERAL Issue, and that is || *Non assumpsit*, which denies that you took upon you to pay that wherewith you are charged in the Declaration; this Action doth not charge a Man with a Debt, for if a Man in case of simple Contract were charged with a Debt, he would

\* That he did not assume within six Years. † Assumption upon being indebted. § That they did not assume within six Years. || He did not undertake.

discharge it by Law Wager; but it charges a Person with the Damage for not performing of that Promise on which he depended, which being a Charge that supposes a Deceit or Injury, there was no Law Wager allowed.

UPON an Assumpsit, Covenant under Hand and Seal to pay the Money, is no Evidence, nor is any Specialty or Matter of Record, or any Contract for Rent.

Cro. Jac. 506,  
598.  
Hob. 284.  
Hurt. 34.  
Brownl. 14.  
Cro. Car. 343.  
Jones 329.  
Danv. Abr. 30. pl. 9, 31. pl. 13.

THE Wife cannot by her Contract bind the Husband, for the Husband is the superior and governing Power, and the Law has intrusted him with the Conduct of the whole Family; and therefore the Wife's Acts in bargaining are wholly void, and if found by special Verdict are not sufficient to bind the Husband.

2 Sid. 109, 128.  
Mod. 124.  
Brownl. 47.  
Danv. Abr. 717.  
pl. 11, 12.  
Keb. 69, 80, 87.  
206, 337, 361,  
383, 429, 441,  
482.  
Lev. 4, 5, 6.  
Vent. 24, 42.  
2 Vent. 155.

BUT the Act of the Wife contracting is presumptive Evidence to persuade the Jury of the Contract of the Husband; for if the Husband permits another to contract for him, it is his own Contract; and where the Wife cohabiting with the Husband takes up Goods in his Name, this \* *prima facie* is to be presumed the Contract of the Husband, for it is to be presumed that the Husband will trust so near a Relation to act for him.

Ibid. and see  
Al. 61.  
Noy 79, 126.  
Litch 126.  
Mar. 60, 82.  
Styl. 18.  
Yelv. 166.  
Palm. 343.  
Cro. Car. 254,  
355, 494.  
Cro. Jac. 661.  
Leon. 312.  
Rol. Abr. 6.  
pl. 6.  
Salk. 113 to 116,  
118.

6 Mod. 239. 2 Show. 283. 10 Mod. 6, 33, 70, 163, 205, 245. 11 Mod. 241.  
Gilb. Eq. Rep. 1, 145, 149. 2 Mod. 244, 245, 372, 603. 9 Mod. 6, 7, 31, 42,  
43, 104. Pre. Ch. 502, 503. Eq. Abr. 61. Ld. Raym. 444, 445. 2 Ld. Raym.  
1006. Stra. 127, 647, 706. 2 Stra. 875, 1122, 1214. Will. Rep. 482, 483.  
3 Will. Rep. 269, 273, 339, 409, 412. 2 Barne's Notes C. P. 72, 74, 80.

\* *At first.*

N 4

BUT

BUT if at the Time of the Contract the Wife were absented from the Husband, this is so far from being the Contract of the Husband, that it is rather the contrary; for it cannot be presumed that a Husband should trust a Wife eloped as his Agent to act for him, so that her contracting in his Name, is no Evidence to charge him.

THE usual Employment of the Wife, cohabiting with the Husband, is good Evidence, but this is no conclusive Evidence, for possibly she might have been always imployed with ready Money, so that it is still a stronger Evidence if the Husband has paid the Debts of the Wife where she has been trusted.

*Ibid.*

AGAIN that the Things were necessary for the Husband and Wife, and the Family, is good Evidence of a Contract to bind the Husband, but yet not conclusive Evidence; for though the Things are of Necessity, yet possibly that Necessity might be otherwise provided for; and they must be necessary not only for his Degree, but to his Estate also, to make the Evidence more conclusive.

*Ibid.*

AGAIN, it is good Evidence to prove the Contract of the Husband, to prove that the Things bought by the Wife, came to the Use of the Husband and his Family, and yet this is not absolutely conclusive, for possibly he had no Notice that they were bought on Credit, otherwise he would not have used them.

So



So if the Husband be absent from his Family, and Things are bought by the Wife, this is good Evidence to prove to the Jury that the Wife did contract in the Place of her Husband; but this is not absolutely conclusive, for possibly he left ready Money, or made some other Provision for his Family.

If the Husband forbid any Person to trust his Wife, and he do trust her, this is an Evidence that the Husband never designed to contract with him by Means of his Wife, and therefore he cannot charge the Husband on any such Contract.

THERE is a great Difference between Evidence offered to the Jury, and offered to the Court on a special Verdict; for if the Jury find that the Wife contracted for Necessaries in the Absence of her Husband, this is good Evidence to persuade the Jury that the Husband did contract, and that his Will was concurring and went along with her in this Transaction; but if this be found and offered to the Court, the Court cannot judge it is the Contract of the Husband, for the Jury are the only Judges of the Fact, and they are to make the Deductions and Conclusions as to the Truth of the Fact from the Evidence as it lies before them.

BUT the Court cannot make any Deductions or Conclusions as to the Truth of the Fact, unless they flow necessarily and demonstratively from the Evidence that the Jury have

have stated, for they are not Judges of Probable or Improbable, but of Lawful and not Lawful. If therefore the Jury do only lay before the Court such as would induce a Man to believe that the Contract of the Wife was the Contract of the Husband, they cannot adjudge it to be so, for they are not Judges of the Probabilities of Facts, but of the Law only; and therefore if the Jury do not lay before them the infallible Signs of a Contract, the Judges, who are to intend nothing, cannot adjudge it to be a Contract.

2 Keble 851.

2 Rev. 144.

Juri per Pais

398.

L. Raym 389

L. E. 159. pl. 13.

Salk 279.

Vent. 170.

3 Keb. 798.

(a) Before 165.

UPON \* *Non assumpsit* the Defendant may give Infancy in Evidence in Discharge of the Promise; but if a Man were at Issue upon † *Non est Factum*, (a) Infancy cannot be given in Evidence, but must be pleaded; for where the Issue relates to a solemn Contract executed with the necessary Solemnities, which Contract had a Being and an Obligation at the Time of making, that is a full Proof of the Issue; for where a solemn Contract has a Force, the Court ought to see that it is legally dissolved; but where there is a Contract in Issue, that is not presumed to be executed with any Solemnity; there a Man may give it in Evidence that it had no Obligation, by Reason of Infancy on the General Issue; for where there are not Solemnities of contracting exhibited to the Court, there it is not necessary that the Court should see the Discharge of that Contract, and therefore if the Party in the Issue proves himself an

\* He did not undertake.

† It is not his Deed.

Infant,

Infant, it amounts to the Proof that he could not assume, and consequently that there was no Assumpsit.

AN Infant brings an Action for six Pounds, for which the Defendant became indebted by a Contract to cut his Grass and carry it away, paying him six Pounds; it is no Objection to say that the Plaintiff is an Infant, and so could give no such Permission, but was intitled to an Action for cutting of his Grass, for the Contracts of the Infant are not void, but voidable at the Election of the Infant, and therefore here is a good Consideration if the Infant will abide by his Bargain.

Vent. 51.  
Mod. 25.  
2 Sid. 41, 446.  
2 Str. 939.  
Danv. Abr. 61.  
pl. 81.  
2 Keb. 581.

A PROMISE to restore an Horse hired for a Journey, and the Defendant gives in Evidence that the Horse died in the Journey, without the Rider's Fault, the Obligation of his Promise is avoided, inasmuch as it becomes impossible by the Act of God, without any Fault of the Defendant; and no Man's Promise shall be supposed to extend to Impossibilities, for what is impossible to be done, is not the Subject of any Man's Promise. But quere, whether it makes this Assumpsit originally void, or whether it avoids it by such subsequent Matter as ought to be pleaded, as Payment avoids the Contract, and yet ought to be pleaded.

Tri. per Pais  
399.  
Lesley's Case  
cited in Mutra-  
ver's Case 1651.  
B. R.

DELIVERY of the Goods is Evidence of the Sale in the \* *Quantum Meruit*, because they shall

Suffex Ass. 1701.

\* How much the Plaintiff deserved to have for them.

be



be supposed to be delivered on the Bargain, and with Expectation of the Price of them.

Goeb. 154.

IN an Assumpsit the Plaintiff declares that the Defendant in Consideration of Marriage assumed to do such a Thing; upon \* *Non assumpsit* the Plaintiff proves a Promise, in Consideration of Marriage, to do three several Things, of which two were performed, and the third left undone, for which he brought the Action. To this the Objection was taken that the Contract proved was substantially different from the Contract alledged; for to do three several Things, and to do one Thing, are not the same, but substantially different; and the Exception was allowed, and the Difference taken between a verbal Contract and a Deed; for if the Contract had been by Deed, the Plaintiff might have declared for Non-performance of one only, because it appears by the Profert, that the Contract alledged, and the Contract proved, are exactly the same, and therefore a Complaint for Non-performance of the one only will be well enough; but on a verbal Contract you must prove the individual Contract you set forth in your Declaration, for if a Latitude were allowed that Contracts might be taken to be the same that substantially differ, no Man by the Allegation could prepare any Defence; for among the great Variety of Transactions that are among Mankind, several Contracts might have an Analogy and Resemblance one to another, and those Men ought to be put to prove the same individual Contract.

\* That he did not undertake,

*Indebitatus* brought by one, the Defendant gives in Evidence that another was Partner with the Plaintiff at the Delivery of the Wares; the Plaintiff must be nonsuited, because he shews the Law, on the Delivery of the Goods, creates a Contract to them both; for the Goods came to be employed for their joint Uses.

Tri. per Pais  
187.  
L. E. 160. pl. 22.

If two Men are jointly bound in an Obligation, and one only is impleaded, on \* *Non est Factum*, he cannot give this in Evidence, for he did seal and deliver the Deed, and so he hath contracted, though not solely, and this ought to be pleaded in Abatement, otherwise it shall be intended that he is a lawful Defendant, having admitted himself to be so by the Pleading in Bar to the Debt; and the other shall be intended not to have sealed; or if he did, that he is dead, and the Contract survives.

Co. Lit. 283.  
5 Co. 119.  
Saund. 291.  
2 Sid. 420.  
Vent. 34.  
Cro. El. 494.  
528.  
2 Keb. 525, 528,  
544.

BUT if an Assumpsit was alledged to be made by one, and upon the Issue they prove a Contract made by two, this seems not to maintain the Declaration; and the Reason of the Difference is this, that upon every Contract with Solemnity, there is a Profert made of it to the Court, so that it appears to be the same on the Declaration and in the Evidence; and if there was a material Variance it might be taken Advantage of by Demurrer; but here in this Case a sole Contract shall be intended, because the Defendant ad-

Vent. 151.

\* It is not his Deed.

mits himself upon Sight of the Declaration to be a lawful Defendant; but where there is no Profert made of the Contract, there the Defendant does not know what the Plaintiff intends to prove, and therefore he must prove the same Contract that was alledged in the Declaration, without any substantial Variance; for nothing can be inferred from the Defendant's Pleading in Bar to this solemn Contract, for he did not know till he came upon the Trial, but that the Plaintiff intended to charge him with the sole Contract.

Maidstone Ass.  
1700.

IN every Assumpsit the substantial Part of the Promise must be laid in the Declaration; as if a Man be to deliver Goods according to a Sample, he must lay it so in the Declaration, for the Courts of Justice must go according to the \* *Allegata & Probata*; and it is not enough that a good Contract should be proved, if it be not alledged. And if the Contract be proved otherwise than as alledged, that is not good Evidence to maintain the Declaration, for then it cannot be supposed the same Contract with the Contract alledged, and therefore the Party must fail in the Proof of that Assumpsit.

Ibid.

BUT if a Man assumes to pay so much Money for Hops if delivered well packed, picked, dried and bagged, this is good Evidence on a general Assumpsit, because so they ought to be whether contracted for or not; for the Party ought to make them merchantable Goods, and see them well deliver-

\* *Allegations and Proofs.*



ed, without any special Provision in the Contract, though there were no more than a general Sale of the Commodity.

ONE brings an Assumpsit for twenty Pounds, and gives in Evidence a Promise that if two would surrender their Right, he would pay them twenty-Pounds a-piece, and that they did surrender their Right, this is good Evidence to maintain the Declaration; for though the Promise is laid absolutely in the Declaration, and the Promise in Proof is upon Condition, yet when that Condition is performed, the Duty becomes absolute, and so is good Proof upon this Declaration.

Tri. per Pais  
399.  
Style 461.

AN Assumpsit for fifteen Quarters of Malt, Evidence of fourteen or fifteen Quarters of Malt, and the Plaintiff nonsuited, because not the same Promise; but on Obligation to deliver twenty Bales of Wool or twenty Pounds, upon Non-payment by the Obligor, the Obligee may sue on either.

Turner's Case,  
Hill. Ass. 1701.  
in Suffex per  
Trant.  
13 Ed. 4. 4. b.

ACTION on a Promise that the Defendant would not sue the Plaintiff, and Evidence that he would forbear to sue him, and allowed to maintain the Declaration, because the forbearing to sue supposes the Suit began.

AN \* *Indebitatus assumpsit* on a Contract in which the Plaintiff sold sixty Combs of Rye to the Defendant at fourteen Shillings *per* Comb, to be delivered at or before *Michaelmas*, and the Money to be paid on the Delivery of the

Tri. per Pais  
400.

\* *Assumption upon being indebted.*

last

last Rye, and the Proof was that fifty Combs were delivered before *Michaelmas*.

FIRST, Though this Agreement be intire for sixty Combs, yet the parting it in the Delivery makes it in the Nature of several Contracts, for the one Party sends it in, and the other accepts it in pursuance of their Agreement, if no other Contract can be proved it shall be understood to be a partial Agreement as to the fifty Combs, for the subsequent Acts of the Parties so expound their Contract, that it shall be understood that the Rye might be delivered by Parts.

2dly, THOUGH the Contract was that the Payment should be on the Delivery, yet a Time being set for the Delivery, it must be intended that the Money ought to be paid when the Delivery should have been, and the Time being past it became a Duty and an \**Indeb' Assumpsit* lies for it, and the Defendant hath his Remedy for not delivering the Residue, for this being a Contract executory on both Sides, each hath Remedy on the other for the Non-performance.

Tri. per Pais  
401.  
2 Keb. 781.  
Mod. 268.  
L. E. 155. pl. 4.

ON †*Indebitatus* no Evidence can be given of an Account current, because such Examination would be too tedious upon Issues; and therefore upon this Case an Action of Account is provided, wherein there is Judgment §*quod computet* before a Master or Auditor, where the whole Matters on both Sides are examined, stated and ballanced.

\* *Assumption upon being indebted.* † *Being indebted.* § *That he accompt.*

GOOD

Good Evidence against a Father that Physick was delivered to his Daughter on his Request, for that was the Consideration on which the Party did deliver the Physick. But this being a Promise for another, *Quere* whether the Statute of Frauds and Perjuries does not require a Note in Writing.

Keb. 439.  
Tri. per pais  
400.

A PROMISE to marry *B.* within three Months, and after there is another Promise to marry her within a Fortnight, this does not discharge the first Promise; but if it had been a Promise to marry her within half a Year, it would have discharged the first Promise; for by taking a latter Promise of longer Time, the Parties must be supposed to intend a Discharge of the Former, or otherwise the latter Promise could have no manner of Intent at all.

Tri. per pais 401.  
Hill. v. Chapp.  
lin. Pasch.  
1658. B. R.

NOTE the Difference between an Assumpsit in Deed and an Assumpsit in Law; in the Assumpsit in Deed where the Contracts are mutual, and either Side declares for Non-performance, there he must set forth the very Contract, and if he mistakes in Quantities or Sums, he fails; because his Injury is in the Non-performance of the very Contract alleged in the Declaration, and if he does not shew such a Contract, he does not intitle himself to a Recompence of the Breach of it.

Dyer 210.  
Al. 28.  
Style 62.  
Cro. El. 292.  
2 Sid. 236.  
Mod. 210.  
Keb. 830, 833.  
L. E. 161.  
pl. 26, 27.  
Comyn. 373.

BUT where he brings his Action for an Assumpsit in Law, if he shews Part of the Goods delivered, or Part of the Money lent,

O

'tis



'tis good; because on every several Delivery of Goods, or Receipt of Money, the Law implies a several Contract for Restitution, and there the Gift of the Injury is not whether such a particular Contract is broken, but whether the Goods were delivered, or Money paid to the Defendant, and the Quantities of the Goods or the Sum is no farther material than to increase or lessen the Damages.

*Petram v.  
Palmer.*

AN Assumpsit wherein the Plaintiff declared that the 27th of June 1712, at *Hoddesdon* the Plaintiff bought of the Defendant, and the Defendant bargained and sold to the Plaintiff, one hundred Quarters of as good Barley as one *William Ford's* was, and of as good Measure as the said *Ford's* was, to be delivered to the Plaintiff at *Hoddesdon* between Harvest and *Candlemas* in the same Year, where the Plaintiff should appoint, after the Rate of sixteen Shillings *per* Quarter, to be paid by the Plaintiff to the Defendant, whereof the Plaintiff paid to the Defendant two Shillings and six Pence in Hand, and agreed to pay the Residue at the Times of Delivery, according to the Quantity of the same at every Time of Delivery, and according to the Rate aforesaid; that the Defendant after the said Bargain, in Consideration of the Premises, assumed that he would deliver to the Plaintiff the said Barley so bargained and sold according to the Bargain; on \* *Non Assumpsit* the Jury found four Pounds Damages, which was subject to the Determination of the Lord Chief

\* *That he did not undertake.*

Chief Justice *Parker* on this Case agreed between the Parties.

THE Defendant on *Saturday* the last of *January* (*Candlemas* Day being the *Monday* following) in the Year 1712, and not before, delivered to the Plaintiff's Use at Mr. *Plummer's* Malt-House at *Hoddesdon* (where the Plaintiff appointed the Barley to be delivered) a Quantity of Barley which was sent for twenty Quarters, but when the same was measured by *Ford's* Bushel it was found to be but nineteen Quarters and a Half, according to that Measure.

THAT the Plaintiff at that Time paid to the Defendant's Servant who brought the Barley, ten Pounds and no more; for although he had the Money, not only which the said twenty Quarters of Barley, but likewise what the one hundred Quarters came to according to the same Agreement, ready by him in the House; yet because the Barley did not hold out in Measure, he paid only ten Pounds, and did not pay the other six Pounds at that Time, but afterwards paid it to the Defendant before the Action brought.

THAT the Price of Barley between the Time of the Contract and the Delivery of the said twenty Quarters rose about, &c.

If upon these Facts proved, the Plaintiff upon this Declaration hath good Cause of Action or not, was referred to the Determination of his Lordship.

IN considering of this Matter two Questions are to be stated.

FIRST, whether the Plaintiff has a Right to the Residue of the one hundred Quarters of Barley, having not paid the full Price for the nineteen Quarters and a Half within the Time prefixed, but only ten Pounds towards it.

SECONDLY, whether the Defendant can take any Advantage of this Non-performance upon the Issue of \* *Non Assumpsit*.

As to the first Point, whether the Plaintiff has a Right to the Residue of the one hundred Quarters of Barley, having not paid the full Price for the nineteen Quarters and a Half within the Time prefixed, but only ten Pounds towards it.

AND here are to be laid down two or three Rules that have been made use of in adjudging several Laws in the Books, and then compare this Case with those Rules.

7 Co. 9,  
10, &c.  
Ld. Raym.  
665, 666.  
Style 186.  
2 Mod. 33, 34.  
Hob. 41. but  
see Salk. 172.  
2 Mod. 62.  
Justin. de Re-  
gulis Juris 361.

THE first Rule is, that where there are several Promises that are mutually executory and independent of each other, there the Promises are Considerations each to the other, and the Plaintiff may bring his Action for Breach of the Defendant's Promise, even tho' his Counter-promise be alike broken; because

\* He did not undertake.



in such a Case the Counter-promise and the Remedy upon it is the Consideration of the Defendant's Agreement, and not the Plaintiff's Performance of his Promise, according to *Justinian's Rule* in the Civil Law; \* *Qui actionem habet ad rem recuperandam, ipsam rem habere videtur*; and upon this Reason touching mutual Promises there are several Cases resolved in the Books. *Hob.* 88, 106. *Rob. Rep.* 125, 336.

AND I believe they on the other Side will not deny me this, which I lay as a Ground and Foundation from whence I would argue, since it still returns a Question whether the Promises set forth in the Declaration are independent on each other.

Secondly, THE second Rule that is laid down in the Books touching these mutual Promises, is this.

THAT where there are any Words made use of in any Promise, Covenant, or Agreement, that do not import a Condition, they are never construed to be conditional, for else the Party would be destitute of all manner of Remedy without such Construction.

THIS is laid down in *Hob.* 41. in the Case of *Cooper* and *Andrews*, and in *Owen.* 54. and in several other Books which I shall beg leave by and By to mention to your Lordship.

\* He who is intitled to an Action to recover a thing, is held to be intitled the thing itself.

AND as it is in itself a Rule founded upon the greatest Reason; for where Words in themselves do not express a Condition, the Law will not frame any Construction to make them conditional, unless such an Implication be absolutely necessary, and it can't be absolutely necessary where the Parties have another Remedy.

THERE are a multitude of Cases resolved upon this Rule; I will only beg leave to mention some few, because I suppose that if this Rule be fully satisfied, it will consequently determine this Point for the Plaintiff.

Hob. 41.

If an Annuity be granted \* *pro Consilio impenso vel impendendo*, there the Word \* *Pro* is construed to be a Condition, because the Party has no other Remedy for the Counsel than by stopping the Annuity; and this is laid down as the Reason.

AND if an Action be brought upon the common Covenant for quiet Enjoyment in a Lease, that the Lessee shall quietly enjoy, paying the Rent and performing the Covenants, there though the Word (paying) would make a Condition if the Party were without Remedy, yet it is not construed to be conditional in this Covenant, but the Defendant is left to his Remedy upon the Reservation of the Rent and Covenants in the Lease.

\* *For Advice given or to be given.*

AND

AND so it was resolved in the Case of *Allen* <sup>2 Sid. 280.</sup>  
and *Babington* reported in *2 Sid. 280.* <sup>2 Keb. 23.</sup>  
23. and in the Case of *Hays* and *Bickerstaff* <sup>2 Mod. 34, 35.</sup>  
in *2 Mod. 34, 35.* See *L. Raym. 666.*

So is the Case in *Rol. Abr. 415.* there were <sup>Cited in L. Raym.</sup>  
Articles of Agreement made by *A.* in the Be- <sup>665.</sup>  
half of *B.* and by *C.* and a Covenant that *B.* <sup>Rol. Abr. 415.</sup>  
from the Considerations aforesaid in the Deed <sup>2 Leon. 211.</sup>  
expressed, shall convey certain Lands to *C.* <sup>3 Leon. 219.</sup>  
in Fee, and *C.* covenants on his Part \* *pro*  
*Considerationibus predict.* to pay *B.* one hun-  
dred Pounds; here though \* *Pro* would make  
a Condition in the Case of an Annuity, yet  
says the Book, that notwithstanding *B.* doth  
not assure the Lands to *C.* yet *C.* is bound to  
pay the Money, and to take his Remedy  
against *A.* on his Covenant.

THE same Law is laid down in the Case <sup>Hob. 88.</sup>  
of *Nichols* and *Rainsbrede* reported in *Hob. 88.* <sup>Cited in Lutw.</sup>  
There *Nichols* brought an *Assumpsit* in Con- <sup>250.</sup>  
sideration that he promised to deliver to the <sup>L. Raym. 665.</sup>  
Defendant to his own Use a Cow, the De- <sup>but see Salk. 172.</sup>  
fendant promised to pay him fifty Shillings;  
adjudged that the Plaintiff need not aver the  
Delivery of the Cow, because it is Promise  
for Promise.

3dly, BUT if the Defendant's Promise do <sup>3d Rule.</sup>  
arise on the Condition of some Act to be <sup>L. Raym. 665.</sup>  
done and performed, and not on a Promise <sup>15 H. 7. 10. b.</sup>  
to do and perform something, there the Act  
must be first executed, and averred to be  
O 4 performed,

\* For the Considerations aforesaid.



performed, before the Defendant's Promise can arise; for the Performance is here the Consideration, and not a Counter-promise.

*Roll. Rep.* 125,  
336.

So is the Case *Roll. Rep.* 125, 336. In Consideration of ten Pounds I promise to deliver to you all the Books of the Law, it is good without alledging the Payment of it, for the other may have an Action for it; but if it be, that in Consideration that if you will pay (in the future Tense) to me ten Pounds, I will deliver to you all the Books of the Law, it is not good without alledging Payment of the ten Pounds; he must aver the Thing to be done, because says the Book, there is no Remedy on this Promise, since it does not arise until the Money is paid, for the Party does not promise to deliver the Books till after Payment of the Money.

*Hob.* 106.  
7 Co. 10. b.  
See *Vin. Abr.* 8, 9.  
5 *Vin.* 57. p. 1.

So is the Case of *Hob.* 106. if I promise, in Consideration of a Man serving me a Year, that I will pay him ten Pounds, there the Service ought to be actually performed before he shall bring his Action for the Money; because the Promise for the ten Pounds arises not from the Promise to serve, but from the actual Service.

3 *Leon.* 219.

So *Brocas's* Case in 3 *Leon.* 219. The Lord of the Manor covenanted with his Copyholder to assure to him and to his Heirs the Freehold and Inheritance of his Copyhold; and the said Copyholder, in Consideration of the same performed, covenanted to pay

pay such a Sum; the Court held that the Copyholder was not tied to pay the said Sum before the Assurance made and the Covenant performed; but if the Words had been, *In Consideration of the said Covenants to be performed*, then he is bound to pay the Money presently, and to have his Remedy over by Covenant.

IN all these Cases the Consideration of such Promises are not the Counter-promise or Agreement, but the Performance; but where the Consideration is meerly a Promise or Agreement to do something, there the first Promise arises before such Agreement on the Plaintiff's Part is performed or fulfilled.

Now to compare this Case to the precedent Rules.

FIRST, there are no Words that are conditional, for the Promise is not expressed in any conditional Terms, that if he be paid for the Delivery of the first Barley, then he shall deliver the rest.

BUT the Words of the Bargain are altogether absolute, for they set forth, that the Plaintiff bought of the Defendant, and the Defendant bargained and sold to the Plaintiff, one hundred Quarters of Barley according to the Rate of sixteen Shillings *per* Quarter for every Quarter, to be paid by Plaintiff to the Defendant, and that the Consideration of this Bargain was the Payment of two Shillings

lings and six Pence in Hand, which was the only Act executed, and the Act executory was the Agreement to pay the Residue at the Times of the Delivery of the Barley, according to the Quantity of the Barley at every Time delivered, and according to the Rate to be paid.

Now in this executory Act there is nothing laid that is antecedently to be performed, before the first Promise is to rise, since the first Promise doth import a compleat Bargain and Sale of the one hundred Quarters, and such Promise is not to arise upon any precedent Condition or Act to be first performed or done by the Plaintiff.

AND if there be Words in the Bargain that import a Condition, and the Counter-promise is in its own Nature executory, the Law will not raise any Condition upon any Implication whatsoever, but leave the Parties to their mutual Remedies.

THE rather in this Case, because if the whole had been delivered at once, then plainly there had been nothing conditional in the Bargain, and if the Defendant provided himself, that there should be several Deliveries, and does not actually provide by an exprefs Condition, that if the Money be not paid for what he had delivered at once, he shall not go on to deliver; the Law cannot create such a Condition by Implication, since the Promise on the Plaintiff's Part is totally executory, and there is no Act executed



cuted or stipulated to be performed before the Promise rises.

AND if there were any such Act executed that was necessary as a precedent Condition to the raising of the Promise on which the Plaintiff declares, it would be an Objection to the Declaration for the not averring such precedent Condition to be performed; but that they on the other Side cannot pretend to, and if they should, the Authorities would be plainly against them.

AND for this there is the Case of *Bettif-worth and Campion* reported in *Yelv.* 133, 134. — The Plaintiff as Executor to his Father, declares that there was a Communication and Agreement, that the Defendant should have all the Iron made at such a Furnace, paying after the Rate of forty Shillings *per Ton*, upon which the Testator did assume to the Defendant, that he should have all the Iron made in that Furnace, in Consideration whereof the Defendant promised to pay the Testator according to the Rate aforesaid, and shews that the Defendant had so many Tons which amounted to so much Money; and it was objected in Arrest of Judgment, that the Plaintiff had not shewn that the Consideration was performed on his Part, and that the Defendant had all the Iron made at the Furnace, which was the Consideration that induced the Defendant to make this Promise; but it was answered, and resolved by the Court, that the Consideration on the Part of the Plaintiff was not that the Defendant should have all the

the Iron, as an Act executed; but that the Testator promised that Defendant should have all the Iron; so that the Consideration on each Part was the mutual Promise the one to the other, for which there is a mutual Remedy: So here that which induces the Defendant's Promise to deliver the one hundred Quarters of Barley is not the actual Payment of any Sum more than the two Shillings and Six-pence mentioned in the Declaration.

BUT it is the Promise of paying the Residue, which is undertaking for a future Act executory, and so expressed in the future Tense, that it should be paid on the Delivery of each Quantity of Barley; wherefore it is the Promise to pay, and not the actual Payment, that makes here the Consideration.

2dly, THE second Question is, whether the Defendant can take Advantage of this upon the Issue of \* *Non Assumpsit*.

Hob. 106.  
Cro. Eliz. 250.  
(14).  
Rol. Rep. 43.  
(16) 401. (29).  
See Moor 854.  
pl. 1168.  
Rol. Rep. 391.  
(11).

AND for this my Lord *Hobart*, fol. 106. is expressly to the Contrary: There the Consideration was, that if a Man served me a Year, I should pay him ten Pounds, there my Lord *Hobart* says, that if the Service was not done, and yet the Promise made, § *prout*, &c. the Defendant must not traverse the Promise, but he must traverse the Performance of the Service, because they are

\* He did not undertake. § *As*.

distinct

distinct in Fact, though they must concur to the barring of the Action.

AND here the true Difference seems to be between an \* *Assumpsit* in Deed and an \* *Assumpsit* in Law; for an \* *Assumpsit* in Law in Consideration of Money received, from the natural Justice of the Thing, creates a Promise till Payment; here the actual Payment or Satisfaction, or a Release, or any other Matter, that excuses Payment, may be given in Evidence on § *Non Assumpsit*.

FOR when the natural Justice for Repayment of the Money ceases, there the Law no longer creates a Promise; and therefore those Matters that go by Way of Excuse, are proper Evidence upon § *Non Assumpsit*, because there is really no Promise when the Defendant can shew there is no Justice to pay the Money.

BUT where the Promise rises by the Act of the Parties, and the Defendant would shew any Thing for an Excuse for Non-performance, there he must shew it to the Court by proper Pleading, because it confesses the being of such Promise, or that such Promise was actually made by the Parties, and avoids it by shewing some special Matter or Reason for not performing it.

THIS Distinction was taken in the Case of <sup>2 Sid. 236.</sup> *Bedford and Clarke*, 2 Sid. 236. and in the <sup>Mod. 210.</sup> *All. 29.*

\* *An Undertaking.* § *He did not undertake.*

Case



Case of *Fitz and Preefont*, *Mod.* 210. and  
*All.* 29.

It was argued by the Defendant, that such Bargains are made for ready Money, and if the Plaintiff promises to deliver such Goods, and the Defendant promises to pay for them, in common Understanding, if the Goods are tendered, and the Party has not the Money, that this shall excuse; and for this they  
 27 Ed. 4. fo. 1. quoted 17 Ed. 4. fol. 1. where an Action of Trespass was brought by the Plaintiff against the Defendant, for breaking his Close and taking his Corn, and quotes Cases there pleaded, that a long Time before the Trespass supposed, the Plaintiff and Defendant bargained at such a Place in *London*, that the Defendant should go to a Place where the Oats were and see them, and if they pleased him, when he saw them, that then he should take them, paying the Plaintiff three Shillings and Four-pence an Acre one with another.

THAT the Defendant went to see them, and was content with the Bargain, and for that Reason took the Corn, which is the same Trespass: It was there objected, that this Plea was not good, because he had not paid the Money according to the Bargain, and it would be mischievous if upon such Communication a Man should take another Man's Property before the Money is paid; and *Littleton* there put a Case, That if a Man should come to a Draper, and there demand of him how much he will have for such a Piece of Cloth, and he says so much; upon  
 I which

which the other says he will give him so much for the Cloth, but does not give him the Money; if he takes the Cloth, the Draper may maintain an Action of Trespass; so *Coke* put a Case, That if a Man should ask how much he should give for my Horse at *Smithfield*, and I say so much; if the other does not pay down the Money immediately, I may sell the Horse to whomsoever I please; for otherwise I should be compelled to keep my Horse against my own Consent, until such Time as the Man should pay it, which was certainly against the Intention of the Parties in their Agreement; and *Littleton* said, that in all such forehanded Bargains, there was a Condition implied in Law, that it should be delivered upon Payment, and that if Payment did not follow, the whole Contract should be void; and it was argued in this Case, that common Usage implied such a Condition where the Goods were to be delivered for ready Money, and that if the Money was not paid, I should not be obliged to part with my Property.

See NoyMax. 87.

*Parker*, Chief Justice, resolved, that the Non-performance of such a Bargain might be properly given in Evidence upon \* *Non Assumpsit*, for now \* *Non Assumpsit* is held to be the general Issue in this Action, though they formerly held the contrary.

BUT as to the Bargain itself, he said that the Defendant having delivered nineteen

\* He did not undertake.

Quarters and a Half without ready Money, there he had dispensed with the Condition as to that Quantity, for though he might have chosen whether he would have delivered it, until he was paid, yet when he did deliver it upon Credit, and without the ready Money paid down, it was a dispensing with that Condition as to that Quantity, and then there was no Reason but that he should go on with the Delivery of the Residue, according to his Contract; for suppose a Condition should go along with it, as it is agreed for the Defendant, that upon every Delivery a ready Payment should be made, yet if the Defendant has dispensed with the Condition, as to the Quantity delivered by letting the Plaintiff have it without prompt Payment, yet that will be no Reason why he should not go on to make the Delivery of the Residue according to his Bargain; for if the Argument be good, that the Law implies a Condition upon the Delivery of every Quantity, that there should be prompt Payment made by the Plaintiff, yet it will not raise a farther Condition, that if he deliver the first Quantity upon Credit, that he should not go on to make a Delivery of the Rest for ready Money, which here the Defendant has not done; and it was by no Means to be admitted, that if the Defendant had delivered Part upon Credit, which was his own Folly, that it should excuse him from delivering the Rest for ready Money according to his Promise.



THE second Sort of General Issues are those that arise on actions that suppose some Misdeeds, as the Civilians call them \* *Actiones quæ oriuntur ex Malitia*.

AND the Issue that we shall here begin with, and which is the most General of all others, is that of *Not guilty*, which runs through a great many Sorts of Actions with a great deal of Variety.

First, in Civil.

Secondly, in Criminal Matters.

AND here we shall begin with *Not guilty* in Ejectment, and,

First, of the Lessors.

Leases.

Secondly, of the Lessees.

Thirdly, of the Entry.

FIRST of the Lessors, and it is to be known that in this Issue, they are to be the same in the Allegation and in the Evidence, for if it appears by the Proof, that the same Persons did not, nor could not transfer that Interest which is said to be transferred by them in the Declaration, the Plaintiff hath not proved his Declaration; for all Courts of Justice must go \* *secundum allegata & probata*; if therefore any Person doth not maintain,

\* *Actiones quæ acciuntur ex Malicia.* † According to the Allegations and Proofs.

by his Proofs, the Matter he hath alledged to the court, he must fail of the Justice he would demand upon those Allegations; and with this agrees the Rule of the Civil Law,  
*\* Quod Probationes sint conformes Libello.*

Cro. Jac. 166.  
 2 Danv. Abr.  
 130. pl. 1.  
 L. E. 254. pl. 23.  
 Show. 342.  
 Tri. per Pais 422.  
 2 Vent. 214.  
 Comb. 190.  
 Carth. 224.

IF a Man declares of a Joint Lease, and on *Not guilty* gives in Evidence the Lease of two Tenants in Common, this doth not prove the Declaration, for when the Declaration alledges that they both demised the Whole, and the Evidence is, that each of them demised their several distinct Parts of the Land in Question, this Proof doth not assert the Contract alledged in the Declaration.

Hill. Aff. 1700.  
 per Treby.  
 Co. Lit. 42.  
 6 Co. 14. b.  
 Poph. 37.  
 Jon. 305.  
 2 Jon. 137.  
 Rol. Rep. 299.  
 Raym. 142.

IF a Man declares of a Joint Lease, and gives in Evidence the Lease of Tenant for Life, and of him in Reversion, this is no Proof of the Declaration, for during the Life of Tenant for Life, it is his Lease of the whole Lands, and therefore this is no Proof of the Contract alledged in the Declaration.

Cro. Jac. 83,  
 166.  
 Tri. per Pais 422.  
 L. E. 253. pl. 22,  
 254. pl. 23.

IF a Man declares of a Joint Lease, and upon the Evidence it appears, that *A. B.* and *C.* were Joint Tenants for Years, and that *C.* let his Part to *A.* and *A.* and *B.* made a Lease to the Plaintiff, it seems that this Evidence doth not answer the Matter alledged in the Declaration, because as to a third Part of the Land *A.* is Tenant in Common.

Cro. Jac. 23.  
 After 247.

THE best Way in all these Cases, where it is any Way doubtful, is to make a Joint

*\* That the Proofs be agreeable to the Libel.*

Lease

## The Law of Evidence.

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Lease, and for the Lessee to enter and make a second Lease, and then to declare on the second Lease generally.

A MAN declares of a Joint Lease by Baron and Feme, and gives in Evidence a Joint Lease made and delivered by them on the Land; this maintains the Declaration, for the Wife may make a Lease of her own Land during the Coverture, and this is not void, but voidable only, for though the Wife's Contract be void during the Coverture, to bind the personal Estate of the Husband in which she hath no Property, yet to bind her own Land in which she hath a Property, continuing during the Coverture, her Contract is not void, but voidable, and if the Contract stand till after the Coverture, she may if she pleases confirm it.

If a Man declares of a Joint Lease by Baron and Feme, and gives in Evidence a Joint Lease delivered by Warrant of Attorney on the Lands, this will not maintain the Declaration; for though the Wife herself may do any Act relating to her Estate, yet she cannot constitute an Attorney to do it, and therefore his Entry and Delivery of the Lease, by Virtue of a Warrant of Attorney from the Wife is wholly void, for she cannot put any Person in her Place to transact for her, who has already devolved all Authority upon her Husband.

Cro. Jac. 617.  
See Trin. per Pail.  
423.  
L. E. 258, pl. 34.  
See Noy 233.  
Cro. Eliz. 165.  
contra, but seems  
to be a Mistake.  
Yelv. 1.  
Brownl. 134.

Cro. Jac. 617.  
Bendl. 134.  
3 Co. 35. b.  
2 Saund. 213.  
L. E. 258, pl. 34.



Moor 682.  
2 Keb. 700.  
Tri. per Pais  
422.  
Contra  
L. Raym. 726.  
which denies the  
Case in Moore to  
be Law.  
Before 146.

If there be several Co-heirs, they must make several Leases to try their Title, because when they demise, their Leases operate according to their several Interests, and the Lessee enjoys from each several Person according to his several Interest, and therefore if he should declare in such Case, that the Co-heirs \* *Demiserunt* so many Acres as the whole contains, he would fail in his Proofs, for each of them demises according to his own Share only; and therefore the safest Method is, where their several Parts are unknown, to join in a Demise of the Whole, and for the Lessee to enter and demise over, and to try the Title in Ejectment by a general Declaration on the second Lease.

Lease.

Secondly of the Lessee.

THE Lease proved, must agree with the Lease alledged in the Commencement of the Term in the Land, and in the Number of Acres, for if it be otherwise, it appears to be another Contract of those Things, which cannot be the same, that materially differ; and if there be not the same Term, the same Land, and the same Quantity of Land, it is a material Difference.

First, as to the Commencement of the Term.

Hob. 73.  
Latch 93.  
2 Rol. Abr. 707.  
(15) 690. A.  
708. pl. 54.  
Brownl. 77.

If a Man declares of a Lease made the 30th of *March*, the eleventh Year of the

Noy. 177. Jenk. Cent. 296. L. E. 264, pl. 47. Moor 863.

\* *Did demise.*

King,

King, to hold from the Feast of the Annunciation next before for the Space of a Year, and he gives in Evidence a Lease made and sealed the 25th of *March*, for one Year from thence next ensuing; this will not maintain his Declaration, for the Lease which is alledged differs in Commencement from the Lease that is proved; for the Lease alledged, begins from the Feast of the Annunciation, so that the 25th of *March* itself is excluded; but the Lease proved is a Lease made the 25th of *March*, for one Year from thence next ensuing, so that here the 25th of *March*, or Feast of the Annunciation, is included.

FOR when a Man passes an Interest from <sup>5 Co. 1. a. b.</sup> the Date, or from <sup>2 Rol. Abr. 520.</sup> thenceforth, which is all <sup>pl. 1.</sup> one, the Interest passes immediately; for Date either signifies the immediate Act or <sup>Date what.</sup> Minute of Delivery, or else the Day or Time of the Delivery; and when an Interest passes from the Date, it is more for the Advantage of the Grantee, that the Date should be reckoned the very Act or Minute of Delivery; for to pass a present Interest from the Date or immediate Delivery, is more for his Advantage, than that it should begin To-morrow; but these Words from the Day of the Date, will never admit of such a Construction, that the Interest should pass from the immediate Delivery before the Day is ended.

BUT where the Date is only a Point of Computation, and the Interest doth not begin from thence, these Words, From the

*The Law of Evidence.*

Date, Henceforth, and from the Day of the Date, are all one; and therefore if a Man declare of a Lease made the 12th of *December*, to begin from the Day of the Date, and upon *Not guilty*, he gives in Evidence, a Lease made the first of *December*, \* *Habendum* from thenceforth, and delivered the 12th of *December*, this will maintain the Declaration; for where the Lease is delivered the 12th of *December*, and could not begin in Interest till the Delivery, so the Date is only a Point from whence the Computation of the Term begins, and it is more for the Interest of the Lessee, that it should be excluded out of the Term, because he could have no Advantage in including it, his Interest not being then begun, and it is thus for his Disadvantage to include it, that the Term would end so much the sooner than it would on the other Construction; and this has been held always a Rule, that when a Word is capable of two Senses, that Sense should be taken that makes most strongly against the Grantor, and most for the Advantage of the Grantee; and this we take to be a very certain Maxim in the Construction of Deeds, for no Man can be intended to hurt himself by the Extent of his own Donation; the Rules of Self-preservation do sufficiently defend Men from any Wrong to their own Interest; it is therefore fit that the Laws of Civil Society should provide for the Interest of the Grantee, that he might not be wronged by a too narrow Construction, and therefore the most bene-

\* *To have.*



ficial must always take Place; besides this Rule is farther friendly to justice, in that it avoids all Manner of Deceit in any Grant, and puts a full End to all Controversies about them; for without this Rule, Men would always affect intricate Words, and so every Grant would be subject to be overthrown, or at least shaken by the Debate about its Meaning.

A MAN declares of a Lease made the 5th of May in the tenth Year of the King, \**Habendum* from the Feast of the Annunciation last past, for twenty-one Years from thence next ensuing, and the Jury found a Lease made the 5th of May in the tenth Year of the King, \**Habendum* from the Feast of the Annunciation then last past, for twenty-one Years next following the Date of the said Indenture, the Lease found by the Jury is the same with the Lease alledged, for both being from the Feast of the Annunciation then last past for twenty-one Years, and they are both expressly for twenty-one Years and no more, so that these Words, *next following the Date of the said Indenture*, are utterly repugnant and void.

See Hob. 18.  
See Tri. per Pais 423.  
Al. 75.  
Styl. 118.  
Rol. Abr. 859.  
Pl. 11.

THE Date is no material Part of the Deed, and therefore if a Man declares of a Lease dated the 14th of December to begin from Christmas last for three Years, and he gives in Evidence a Lease dated, sealed and delivered the 13th of December, to begin from Christmas last for three Years, this Lease in the

4 Leon. 14.  
5 Co. 4. 5.  
Tri. per Pais 426, 427.  
L. E. 252. pl. 21.

\* To have.

substantial Part of it being the same, viz. in Commencement, and in the Quantity of the Lands, though it differ in the circumstantial and immaterial Part of the Contract, yet it is good Evidence to maintain the Lease alledged; for those Things are the same that do not materially differ. Also the Declaration says, that J. S. the 14th of *December* demised it, which is the Matter of Substance in setting out the Demise, and that is proved to be true by the Evidence offered, for if he demised it the 13th, it continued demised the 14th also.

Ha. sup. Lit. 6.

BUT if a Bond be alledged to be dated the 2d of *August*, and the Party gives in Evidence a Bond dated the first of *August*, this seems not to maintain the Issue, because though the Bond be the same in all Circumstances but that of the Date only, yet might they have been different Contracts, for a Man may oblige himself in twenty Pounds one Day, and in another twenty Pounds another Day to the same Person, so \* *primâ facie* if the Dates do not agree, without more Evidence the Plaintiff fails in his Issue; so that if a Man declares of a Bond dated the second of *August*, and the Jury find a Bond dated the first of *August*, the Court that are not Judges of probable and improbable, and who cannot intend a Bond to be delivered before its Date, cannot adjudge them to be the same; and this is not like the Case of the Leases, for if the Leases agree in all other Circumstances but the Date only, they pass the same

\* *At first.*

Lands

Lands for the same Term, and are therefore in Effect the same; but two Bonds may agree in all things but the Date, and be two distinct Bonds, since they may be for two distinct twenty Pounds, and therefore without an Identity of Date they are not \* *prima facie* Evidence of one another.

BUT if a Man declares of a Bond made the 1st of *August*, and upon the Proferit it appears to be a Bond dated the second of *August*, upon Demurrer the Court cannot adjudge them to be the same, for the Court then are not to intend any thing relating to the Fact but what appears, inasmuch as they are not Judges of the probable and improbable, but the Jury only, they cannot adjudge these Contracts to be the same that differ in Appearance, for that were to take upon themselves a Judgment of the Fact, which they cannot do, and therefore they must adjudge them to be as set forth, and so they are different Contracts.

BUT if after Oyer of the Bond the Defendant pleads § *Non est Factum*, and the Jury find that it is his Deed, the Court will intend the Bond dated the 1st of *August* was delivered the 2d of *August* in Support of the Right, for a Deed might be dated and sealed one Day and delivered afterwards on another, and so the Declaration was good of a Bond made the 2d of *August*.

\* *At first.* § *That it is not his Deed.*

BUT



Hal. sep. Lit. 6. BUT if the Bond was alledged to be made the 1st of *August*, and upon *Oyer* it appears to be dated the 2d of *August*, it seems that after the Deed is found, that this will be a good Objection in Arrest of Judgment; for the Bond cannot be intended to be delivered before its Date, for the Date is the Time of its Sealing, and the Deed cannot be delivered as the Deed before it has the Essentials of the Deed by the Seal of the Party; and so it cannot be helped by the Verdict.

2 Co. 4, 5. BUT if a Bond is alledged to be dated the 1st of *August*, and so it appeared to be upon *Oyer*, yet if the Jury find that this Bond dated 1st of *August* was in Reality sealed and delivered any other Day, 'tis well enough, for the Date is not a material Part of the Contract, and if the Contract offered to the Court was sealed and delivered at another Time, yet it is the Deed.

Goddard's Case.  
Cro. Jac. 136.  
L. E. 201. pl. 28.  
Cro. Car. 77.  
2 Rol. Abr. 677.

HAVING thus considered the Dates, we return again to the Commencement of the Leases.

A LEASE of one Commencement cannot be proved by a Lease of another; but where a Man alledges a Lease to answer some special Purpose, and the Jury find a Lease of another Commencement, yet if the Lease be sufficient to answer that Purpose, he shall prevail.

As

As if in a Replevin the Defendant avows Hob. 73. for taking Plaintiff's Beast in his Common Damage feasant; Plaintiff replies that *J. S.* was seised of an House and Lands to which he had Common, and demised the same to the Plaintiff the 30th of *March*; the Avowant traverses the Demise \* *modo & forma*, and the Jury find a Lease the 25th of *March* from *J. S.* this is well enough, and Judgment shall be for the Plaintiff; for they find enough upon the whole Matter to assert the Plaintiff's Right of Common; so that their Verdict, though different from what is alleged, yet is sufficient to justify the Plaintiff's Right of Common; for though they do not find the Allegation itself, yet they find what will answer the Purpose of the Allegation, and that sufficeth.

But if they had found a Lease by *J. N.* Hob. 73.  
2 Rol. Abr.  
704. (35).  
Ander. 13, 29,  
118. they had not found enough to answer the Intent of the Allegation, nor to direct the Judgment of the Court, for the Defendant admits by his Rejoinder that *J. S.* was seised of an House and Lands, and had a Right of Common, in as much as he only denies the Demise to the Plaintiff, but possibly had the Plaintiff alleged Seisin of such a House and Lands in *J. N.* to which Common was Appendant, the Defendant would have traversed the Seisin of *J. N.* or the Appendency of the Common; so that the finding of the Lease of *J. N.* would not on the whole Matter answer

\* *In Manner and Form.*

the Plaintiff's Purpose, because the Defendant doth not admit the Seisin of *J. N.* nor the Appendancy of the Common to his House, so that upon such a finding of the Jury the Court would not adjudge the Plaintiff's Beasts to be returned.

**Plowd. Com. 14.** IF a Man declare of a Parol Lease, and give in Evidence a Lease by Indenture, this will not maintain the Declaration; for all Contracts that are executed with Solemnity ought first to be offered to the Court, who are the proper Judges of all Things that belong to the Effect of such Contract, before they can be given in Evidence to the Jury to judge of the Fact, whether such a Contract was really executed.

**Sid. 432.**  
**2 Vent. 174.**  
**L. E. 260. pl. 38.** DECLARATION in Ejectment of *Michael-*  
*mas* Term which relates to the first Day of the Term, and the Lease declared on bears Date sometime after the first Day of Term, yet if it appears by Evidence that the Bill was filed after the first Day, 'tis sufficient, for the Act of Law shall do no Man an Injury, and therefore the Relation of Bills to the first Day of Term cannot obtain in this Case, for then it would delay a Man's Remedy, and a Man that was ejected after the first Day of Term could not complain till the Term was over.

**Cro. El. 13.**  
**L. E. 250. pl. 18.**  
**Yelv. 166.**  
**Owen 133.**  
**Brownl. 145.** IN Ejectment a Man declares on a Lease for one hundred Acres, and gives in Evidence an Ejectment out of forty Acres; and this



this was held to be good for the forty Acres; because the Jury find an Injury relating to the same Land thus butted and bounded as in the Declaration, though that Land be not of the same Extent as is there alledged, and it appears that it is the same Land thus butted and bounded that was let to the Plaintiff, and the Defendant did him an Injury by his Ejectment.

BUT, if the Land or Number of Acres be mistaken in the Declaration, some have said that this is fatal, and the Lease of other Lands for another Number of Acres cannot be given in Evidence to support it, because hereby the Contract alledged would be materially different from the Contract proved, which our Law doth not allow of; \* *Causa qua supra.*

Heath's Max. of pleading 8.

24. For others hold the contrary.

If a Man declares of a Lease of so many Acres of Meadow and so many Acres of Pasture, and gives in Evidence a Demise of the Herbage and Pannage of so many Acres, this will not maintain the Issue, for the Contract which he alledges is for the whole Profits of the Soil, and therefore the Contract ought to be brought for so many Acres of Herbage for which an Ejectment lies; for when a Man hath the whole Estate, and lets Part of it, the Lessee must declare upon that Contract as it is, and not of another.

Hard. 330.

L. E. 254. pl. 24.

\* For the Reason above.

BUT

Cro. Car. 362.  
3 Inst. 4.

BUT if a Man hath the Inheritance in the Grass, or in \* *prima Tonsura*, and lets this to another for Years, and the Lease imports a Lease of the Lands, the Lessee may declare upon this Lease, and give this Title of his Lessor in Evidence, for he that hath the first Grass, or \* *prima Tonsura*, hath the most signal Profits, and therefore he is reputed to have the Freehold; and he that hath the After-Grass hath only a Profit apprender out of these Lands in the Nature of a Common; and therefore when he that hath the first Grass, lets the Lands by the Name of the first Crop of the Lands, he hath done according to his Power, in as much as he had the very Property in the Lands themselves, and then his Lessee must declare according to the Contract which is on the Lease of the Lands themselves: But where any Person has the Lands and lets the Herbage, there the Lessee must declare according to his Contract, otherwise he will fail in his Proof.

Cro. El. 676.  
Hard. 330.  
L. E. 254. pl. 24.

IF a Man declares of a Lease generally, and gives in Evidence a Lease made by a Copyholder, or by the Guardian to an Infant, this is well enough, for such Lease is good against every Person but him that hath Right, as all other Possession is, so the Lease is maintainable against every Person but the Lord or the Infant.

Dyer 32.

IN Debt if a Man declares of a Lease of twenty-six Acres of Land, and he gives in

\* *The first Cutting.*

Evidence,

Evidence, and the Jury find, a Lease of twenty Acres of Land, this will not maintain the Declaration; for if the Number of Acres are not the same, it is not in Substance the same with the Lease alledged, and therefore the Party hath failed in his Allegation.

Leon. 44.  
9 Co. 14.  
Pl. Com. 92.  
Hob. 54.

BUT if a Man declare on a Lease for twenty-six Acres, and the Defendant says that he let these twenty-six Acres of Land and four more, and concludes with a Traverse, \* *absque hoc*, that he let twenty-six Acres of Land only, and the Jury find twenty Acres; this by the better Opinions is found for the Plaintiff, for the Jury are only to try the Matter of Debate, and not any Point in which the Parties are agreed; now they both agree that there were twenty-six Acres demised, and consequently when they find there were but twenty, they find for the Plaintiff, in as much as they have not found more than the Defendant hath admitted, which was the Matter in Question.

Dyer 32.  
2 Sid. 406.  
Saund. 209.  
Co. 30. b.  
Hob. 53, 80.

IF a Man declares of a Lease dated the 28th of January, and it be found sealed the 29th of January, and the Plaintiff be found to be ejected the 30th, this is well enough, as long as it appears that the Plaintiff was ejected after the Lease made, otherwise it is if the Ejectment had been laid the 28th.

Dalif. 105.

IF a Man declares for a Messuage and eleven Acres of Land thereunto appertaining, though the Words *thereunto appertaining*

Plowd. Com.  
85, 86.

• Without this.

be



be void, in as much as Lands cannot appertain to a Messuage, yet since in common Speech the Lands let with a Messuage are said to appertain to it, it is Matter of Evidence to prove what eleven Acres be intended; and if a Man has two Manors called *Dale*, and levies a Fine of one of them, he may prove by Circumstaues which of the Manors he intended.

### Thirdly, Entry and Ouster.

FORMERLY there used to be an actual Entry and Ouster; now by Rule of Court they confess Entry and Ouster, and insist on nothing but the Title.

Hill. Aff. 1700.  
per Treby.  
Vent. 42, 248,  
332.

BUT the Confession of Entry doth not extend to such Cases where it is necessary to prove an Entry to make a Title in the Lessor of the Plaintiff, for the Rule is to confess Entry of the Lessee, and not of the Lessor; and the Rule is intended more conveniently to try the Title of the Lessor, and not with any Design to make any Part of his Title.

Salk. 259.  
Saund. 319.

Vent. 332.  
2 Stra. 1086.  
Andr. 125.  
Hardw. 98, 99.  
2 Barnard. 217.

AND therefore where an Entry is necessary to take Advantage of a Condition broken, or to avoid a Fine, there the Lessor must make an actual Entry.

2 Sid. 223.  
Hil. Aff. 1700.  
per Treby.  
2 L. Raym. 750.  
Salk. 259.

PLAINTIFF makes a Title by Lease of five thousand Years sealed and delivered at *London*, and the Defendant insisted on the Proof of Entry by Virtue of that Lease, but the

the Court presumed an Entry unless the contrary was shewn on the other Side; but quere, for it seems to be incumbent on the Plaintiff to prove whatever is necessary to give him a Title, and the having a Lease seems to be no Presumption that the Party entered by Force of that Lease.

A MAN may make a Lease of tithes to try his Title in Ejectment; but if a Man bring an Ejectment of the Rectory, and gives the taking of the Tithes in Evidence, this doth not maintain the Declaration; for this is no Ejectment out of the Rectory, for the Tithe is an incorporeal Inheritance collateral to the Rectory, and no Parcel of it, for the Rectory is the Church and Glebe, into which the Parson by his Induction is seised; and therefore they must prove an Entry into the Glebe in this Ejectment, for it continues a Rectory though the Parson had aliened all his Tithes during his Life.

Vaugh. 196,  
197, 198.  
Latch 62.  
Jones 321,  
322.  
Cro. Car. 301.  
Sid. 91.  
Keb. 368.  
L. E. 255. pl. 26.  
Hob. 58.

If a Man makes a Lease to begin *\* a die date*, he cannot prove his Entry at the Day when the Lease was made, for that were a Disseisin, in as much as the Day itself is not included.

Tri. per Pais  
6th Ed. 390.  
Str. 550.

If a Man makes a general Entry into Part, this is sufficient to vest the whole Estate; as if an Ancestor die, and the Estate descend to the Heir, the Entry into Part is sufficient to vest the whole Estate, though he doth not say he entered in the Name of the Whole, for the

Co. Lit. 15. b.

\* From the Day of the Date.

Q

Pre-

Presumption of Law is always in favour of the Possessor until the contrary can appear.

Now the Ancestor dying, the Possession is cast upon the Heir, to preserve a Tenant to the \* *Præcipe*, and since he is by the Law reputed the Possessor, his general Act of Entry without more saying, must be taken in favour of Possession, as an Act with Intention to possess the Whole; I say this is † *prima facie* a Construction of that Act, unless the contrary appear, that is, unless by any Words he makes it a special Entry; as if he says, he enters into that Acre only, for the Act is to be interpreted according to the Mind of the Party from whom it proceeds.

Co. Lit. 15. b.

BUT where a Man enters to devest an Estate, there his Entry must be Special, for he must enter into some one Acre, in the Name of the Whole; and this is upon the same Reason, for the Presumption of the Law is still in favour of the Possessor, unless the contrary shall appear; for if a Man enters generally into one Acre, without saying in the Name of the Rest, he shall not be intended to defeat any more than that Acre on which he entered; for since his Adversary is possessed of the Rest, the Law will not intend the Claim of the Possession any farther than the Words of him that made it.

BUT this Presumption stands only till the contrary appears; for if by express Words

\* *Præcipe*.

† *Act first*.



he shewed an Intention to claim the Whole; and set up a Right to it, then cannot a naked Possession withstand that Claim which plainly appears to destroy it.

WHERE the Seisin is the same, there one Co. Lit. 252. b. Entry only in the Name of the Whole sufficeth; for by the Act of Entry it plainly appears, in the Country (for whom those solemn Acts were provided) that the Party intended to defeat the whole Possession.

IF a Man disseises another of one Acre, and at another Time of another, the Party that hath a Right, may enter into one in the Name of the Whole, for the Possession is the same, and there is the same Person to defend it.

BUT where the Seisin is different, there the Entry must be distinct in both Acres, and he cannot enter into one in the Name of both; for let my Intention be what it will, what defeats one Man's Estate, will never defeat another's; for no Man's Possession can be defeated by an Act which doth not relate to the Possession; and where the Possession and Seisin are distinct, the Act which defeats another Man's Seisin has no Relation to mine; for I am not concerned to know or defend it.

THEREFORE if a Man disseises another of Ibid. two Acres of Land, and makes a Lease for Latch 71. Palm. 402. Life of one Acre, and the like of the other,

the Disseisee must make different Entries; because two Tenants for Life have two distinct Seisins of their Estates for Life, which they are both distinctly to defend.

Co. Lit. 252.

BUT if he had let it to two Persons for Years, the Possession of the Tenant for Years is the Possession of the Disseisor, and they are only looked upon as his Bailiffs to keep Possession for him, and upon him rests the Defence of the intire Possession; and therefore the Law reckons one Entry in the Name of them both to be sufficient, because the Possession and Seisin of the Freehold is united in the Disseisor.

Co. Lit. 49. b.  
Plowd. 92, 93.

IF a Man enters to another Purpose, as to deliver a Lease upon the Land, this is no Entry to defeat the Possession of the Disseisor, for a Man's Intention is to be regarded, and that gives the Signification and Value to the Action, and without an Intent appearing to defeat the Possession, this is as no Entry at all.

IF there be a Disseisin of two Acres in two different Counties, at the same Time, there must be distinct Entries; for the Solemnity of Entry is required for the Sake of the Country, that they may know in whom the Possession resides; and besides, as all Counties met in distinct Bodies in their proper County Courts, where the Estate was in different Counties, the Entries for their Notice was ordained to be several.

IF

If a Thing begin without Solemnity, it Co. Lit. 214,  
may be defeated without Entry, for it re- 215.  
quires no more Notoriety to defeat the Pos- Plowd. 133. b.  
session than it did to begin it; and therefore  
if a Lease for Years, upon Non-payment of  
the Rent were to be void, the Estate is in  
the Lessor without any Entry, because it be-  
gan without any Solemnity; but if a Lease  
for Life, upon Non-payment of Rent were  
to be void, yet it cannot be avoided without  
Entry, because it began with Livery; but if  
the Condition of a Lease for Years were,  
that upon Non-payment of Rent, the Lessor  
should re-enter, there by the express Words  
of the Contract there must be an Entry.

If a Man make several Conditions annexed Co. Lit. 252. b.  
to several Feoffments of two several Acres  
of Land, and both Conditions are broken,  
he must make several Entries into each Acre,  
and cannot enter into one in the Name of  
both; because the Ceremony of Livery was  
distinct, by which Notice was given, that  
Possession did begin in the Feoffee, and the  
Force of that Ceremony continues till defeat-  
ed by an Act of the same Notoriety; and the  
Defeating of one Ceremony quite distinct  
from the other, can be no Notice that the  
other is also destroyed and defeated, and  
therefore the Entry must be different.

If *I. S.* is a Trustee of a Lease for *I. N.* Trin. Aff. 1700.  
and is dispossessed, and a Stranger enters in per Nevil.  
the Name, and by the Direction of *I. N.*  
this is no Entry of *I. S.* the Trustee, because



*The Law of Evidence.*

not made in his Name, nor by the Direction of him who had the legal Estate; and an Entry that defeats Possession, is to be taken according to the stricter Letter of the Law, and by the Common Law *I. N.* had not the Right of the Term, but *I. S.* only.

Thirdly, The Title in the Lessor of the Plaintiff.

AND here I shall not speak of all the Controversies relating to Title, for that were an endless and confused Work, and would draw in all the Doctrine of the Tenure under this Head; but here I shall only mention the less Particularities of Title that generally escape the other Places, and therefore fit to be reduced hither by themselves.

Tri. per Pais,  
6th Ed. 386.

IF a Man issues an \* *Elegit*, and brings an Ejectment to try his Title, he must shew his \* *Elegit* filed, for that Remedy is founded on the Choice of the Lands rather than on the Body of the Debtor, and therefore his Choice must appear of Record, since from that Choice he derives this Sort of Execution.

IF Lessee after the Commencement of his Lease make a Lease to another, or assign it over, the second Lessee must prove the Possession of the first Lessee, otherwise he will fail in his Issue, for without Possession the first Lease was a Chose in Action, not transferable over; and the Reason of the Rule why

\* *A Writ so called, because the Words he chose are an emphatical Part of it.*

why a Chose in Action was not transferable, was from Danger of Maintenance of great Lords, which was a very political Law, while the Tenures continued in a perpetual Subordination one under the other.

In the Trustee of a Lease be Lessor in Ejectment, his Disclaimer (a) in \*Pais will avoid the Plaintiff's Title; for no Man can have Right against his own disclaiming of Right, and the only Remedy that †Cestui que Trust has, is by Bill in Equity to punish the corrupt Conscience of the Party who disclaimed a Right to the Land when he had taken the Trust and Charge of it upon him.

Tri. per pais,  
6th Ed. 387.  
2 Keb. 795.

In Ejectment the Defendant shall not give in Evidence a former Mortgage or Conveyance made by himself, because he can't take Advantage of one Contract that he himself has made, thereby to destroy another, but in this Case the Party who hath the Interest, must get to be made a Defendant.

Tri. per Pais,  
6th Ed. 388.

A PARSON in Ejectment, must prove Admission, Institution, and Induction, his subscribing the Articles, and declaring a full and free Assent and Consent to the Common Prayer.

Tri. per Pais  
389.  
6 Co. 29. b.  
2 Sid. 220.

For the Plaintiff must make out a good Title to himself, and therefore he must not only prove that it was well filled at first, but that it continued full till the Time of the

(a) On the Trial. \* Fact. † He for whom the Trust is.

Action brought; for he must deduce his Right down to the Time of bringing the Action; and by the Statute, unless he subscribe the Articles, and declare his Assent, the Living becomes \* *ipso facto* void without any Sentence Declaratory; so that unless he proves the doing of the Thing required, he doth not prove the Living full at the Time of the Action, and so makes no Title at all to himself.

BUT after ten or twenty Years Possession, the Clergy shall not be put to the precise Proof of these Subscriptions, for the long Possession is a Presumption, unless the Contrary be proved; and all Things must be supposed to be well done, unless within some reasonable Time it were called in Question.

2 Sid. 221.  
Tri. per Pais,  
6th Ed. 389.

BUT if the Parson shews Admission, Institution, and Induction, he need not shew any Right in his Patron on the Ejectment; for if he fill the Church, he hath a Title to the Glebe and the Revenues against all Men; and the Right of the Patron must be contended with the Patron himself in a † *Quare Impedit*, or if the Time be elapsed, in a Writ of Right of an Advowson.

3 Mod. 36.  
L. E. 121. pl. 92.

THE Oath of the Party in *Chancery*, that the Estate is free from all Charges and Incumbrances, is a Presumption, that the Settlement made before any such Purchase or Mortgage, on which the Oath is taken, is a

\* *Instantly.*

† *Why he is impeded.*

fraudulent



fraudulent Settlement; because no Man shall be presumed to swear falsely, or to undervalue the Obligation of an Oath, therefore the former Settlement must be presumed as fraudulent, and no real Incumbrance; but this Presumption is of the less Value, because if the Settlement be fraudulent, there must be a Fraud presumed in the Party, and it must be left to the Jury whether they will presume a Fraud or a Perjury.

If on Not guilty pleaded the Lessor of the Plaintiff shews a Feoffment, the Defendant may give Covin in Evidence; but if on \* *Nient feoffa pas*, the Plaintiff shews a Feoffment, the Defendant can never give Covin in Evidence; for in the first Case, however the Defendant contradicts the Title of the Plaintiff, as long as he shews that there was no Title in the Lessor of the Plaintiff, it sufficeth; and if the Title of the Lessor depends upon a Feoffment, which the Defendant shews to be covinous, he destroys his Title; but when the Issue is Feoffment, or no Feoffment, there the only Question is, whether there be that Contract, with all the Solemnities which the Law requires to a Feoffment, and not whether it were done with a fraudulent Intention; for where special Issues are taken, no Body can run into any Point that is out of the Issue, to which the Parties are unprepared, but on the general Issue whatever tends to satisfy the Plaintiff's Cause of Complaint, may be given in Evidence; for a Feoffment cannot be called abso-

Hob. 72, 166.

\* *Nothing enfeoffed.*

lutely void, which is covinous, and therefore Covin cannot be given in Evidence upon the \* *Nient enfeoffa pas*, for since a Notice is given by the Livery, in whom the Freehold is, the Act of Livery which subserves that Purpose, cannot be reputed absolutely void; and therefore it shall never be said, that it is no Feoffment at all, because it is a sufficient Notice to direct the *Præcipe* of a Stranger.

Hob. 72.

BUT if a Man enfeoffed by Covin, to avoid the Debts of Creditors, pleads that he was seised at the Time of the Judgment by Virtue of a Feoffment, and the Creditor, that he was not seised at the Time of the Judgment, nor at any Time afterwards, on this Issue the Covin may be given in Evidence; for this is indeed no *Seisin*, by the plain Words of the Statute, to avoid the Extent of the Creditors.

If the Heir pleads § *Riens per Descent*, and to shew that there was nothing descended to him, gives in Evidence a Feoffment, the Plaintiff may in Opposition give Covin in Evidence; for this is to destroy the Effect of the Feoffment, which indeed hath no Effect to defend, and cover the Heir from the Actions of his Ancestors Creditors, by the Design of the Statute; and the Creditor in this cannot be put to plead it, because he could not foresee any such secret Feoffment, or know whether the Heir would insist on

\* *Nothing enfeoffed.* § *Nothing by Descent.*

it, till it is offered in Evidence, and therefore, that is the proper Time to encounter it with the Proof of the Covin.

A VOLUNTARY Conveyance hath no Badge Style 446. of Fraud, unless the Party were then in Debt, or in Treaty for a Sale of the Lands; for a Man may have Reason to settle for the Good of his Wife and Children, and if he hath a clear Estate, and no Intention to sell, the Settlement must be taken to be a good one, for that cannot lie under a Suspicion, where there is no Discovery made of an Intent to use that Settlement to fraudulent Purposes at the Time of making it.

IF Copies of Court Rolls be shewn to Style 450. prove a customary Estate, the Enjoyment of such Estate must be proved, otherwise it is not good; as if the Custom was to be proved of intailing Copyholds, you must not only prove from the Rolls, that there were such Intails, but also an Enjoyment under them accordingly, for the Rolls only shew that such an Estate was limited, and that the Intailing of Copyholds was endeavoured at, but this doth not prove an Usage, unless the Parties continued in Possession undisturbed under it; for the Words of Limitation to a Man and to the Heirs of his Body, make a Fee-simple conditional at Common Law, and therefore from the Words of the Roll, without Proof of the Usage, you cannot collect that there was a Custom of Intailing,

Secondly,



Secondly, Of the Issue Not guilty in Trespass.

AND first we ought to shew what Evidence must, may or may not be given on the Part of the Plaintiff.

SECONDLY, What Evidence may, or may not be given on the Part of the Defendant.

FIRST, What Evidence may be given by the Plaintiff to prove his Declaration.

Cro. Jac. 183,  
184.  
Yelv. 114.  
Noy 125.  
Brownl. 210.

IF a Man declares in Trespass, and assigns the Trespass in an Acre of Land, thus butted and bounded, and gives Evidence of a Trespass in half that Acre, it is sufficient; for since a Man proves the Damage to be done within the Bounds alledged in the Declaration, he proves what is alledged; in as much as the Damages only are to be recovered on these Allegations, he has sufficiently proved that Damage which ought to be redressed, for a Trespass in any Part of the Acre, is a Trespass in the Acre, and so answers the Declaration. But if a Man declares in Ejectment for an Acre thus bounded, and proves Title to but half, this is not sufficient, unless he distinguishes the Premisses, nor can any Execution be had by Delivery of Possession of Part, unless that Part be ascertained, for one Part of an Acre may be much better and more fruitful than the other.

Cro. Jac. 183,  
184.  
Yelv. 114.

If there be two Tenants in Common, and one brings an Action without the other, the Defendant cannot take Advantage of this, upon the general Issue, but he ought to have pleaded it in Abatement; for when the Plaintiff proves that he had the Possession of the Soil, and that there was a Violation of that Possession by the Trespass of the Defendant, he proves, his Declaration, for the Manner of having or possessing is not called in Question in the Declaration; whether he had it with another or to himself alone, 'tis still \* *Clausum ejus*, and if violated by the Defendant, the Plaintiff is to be redress'd, and 'tis not incumbent on him to prove any more than what he has alledg'd, that the Close or Field was his own, and that a Trespass was there committed by the Defendant; and this is not like the Case in Ejectment, where a Man declares of a sole Demise, and gives in Evidence the Demise of Tenants in Common; for there the Plaintiff doth not prove the Title that he hath alledged in the Declaration, and so fails in his Evidence; but where one Tenant in Common brings Trespass, he doth not bring his Writ in the Manner the Law requires; for since each has an undivided Property in Gross, both should have brought their Action of Trespass for the Damage to it, and if the Writ be not brought in the Manner the Law requires it, the Defendant may plead it in Abatement.

Cro. Jac. 184.

Tri. per Pais,  
6th Edit. 409.  
2 Stra. 320.

\* *His Close.*

BUT

3 Leon. 83, 94.  
L. E. 223. pl. 26.

BUT if there be two Tenants in Common; and one brings an Action against the other, they may take Advantage of this on the general Issue; as in Trespass, and Not guilty pleaded, the Defendant gives in Evidence that *Bromley* was seised in Fee, and let the Premises to the Plaintiff, and one *A.* who assigned the same to *B.* by whose Commandment the Defendant entered; and this was allowed to be good Evidence for the Defendant on the general Issue, for this disproves the Fact alleged in the Declaration; for by this it appears he did not violate the Property of the Plaintiff, he did not enter into a Close that was his alone, but into his own Close.

Tri. per Pais,  
6th Edit. 396.

IN Trespass for taking down a Pew, the Evidence was, that the Pew was fastened to the Pillar of the Church with a Chain; this is no good Evidence to prove the Declaration; otherwise it is if it had been fixed to the Pillar by a Nail; for in the one Case 'tis not fixed to the Freehold, but in the other it is; for whatever is fixed to a Church or House is reckoned Part of the Church or House in which it is fixed; for the Church is an House that consists in its Frame and Building of several distinct Materials fixed one in another; whatever therefore is fixed to the House or Church, is a Part of it; but if it be fixed to another Thing that is fixed to the House or Church, it may then belong to another, for not being immediately fixed to the Frame of the House or Church, it cannot be reckoned Part of it.



IF a Man recovers in an erroneous Judgment, and Trespass be committed by a Stranger on the Land, and after the Judgment is reversed by Error, yet in Trespass brought by the Recoverer, he shall give this whole Matter in Evidence, and maintain his Declaration; for though the Writ of Error destroys the Judgment between the Parties by Relation and Fiction of Law to advance the Right, yet that Fiction of Law shall not be set up to encourage Wrong and discharge the Trespasser, for the whole Profits are recovered by the Plaintiff in the Writ of Error against the Party that recovered in the Judgment, and therefore 'tis fit that he should punish all Trespasses, and not pay for that which he never received.

UPON Trespass brought against *A.* upon Evidence that the Hogs of *B.* were kept in the Defendant's Yard, (adjoining to the Land of the Plaintiff) by the Servant of *B.* and yet it was allowed that this Evidence did maintain the Declaration against *A.*

Clayton 33.  
Tri. per Pais.  
6th Edit. 398.

So in Trespass against *A.* Evidence given of Agistment of Beasts taken into the Land of *A.* and allowed to maintain the Declaration against *A.*

Clayton 32.  
Tri. per Pais.  
6th Edit. 368.

FOR *A.* in these Cases had a special Property in the Beasts, and tis by Reason of that Property the Trespass is committed, and therefore he is justly answerable for it;  
for

for had not the Beasts been taken in the Ground they had never broke into the Ground adjoining.

2 Sid. 225.  
Keb. 787.  
L.E. 234. pl. 57.  
Cro. Jac. 534.

In Trespafs \* *Quare Clausum & Domum fregit & alia enormia ei intulit*, upon the Evidence it appeared that an Injury was offered to the Plaintiff's Daughter, and it was allowed that any Matter that arose † *ex turpi causa* might be given in Evidence upon the general Declaration of § *alia enormia ei intulit*; but any other Matter that doth not arise † *ex turpi causa* could not be given in Evidence on the general Declaration of § *alia enormia ei intulit*, but it ought to have been expressly set forth in the Declaration, or else nothing could be given in Evidence thereunto relating; for it doth not seem to agree with Modesty to express the Manner of any indecent Commerce, but all such Things must be more properly hid under general Words, and therefore may be fitly given in Evidence on the § *alia enormia ei intulit*.

Tri. per Pais,  
6th Edit. 400.  
Gouldf. 124,  
125.  
2 Rol. Abr. 677.  
pl. 1, 2.  
L.E. 227. pl. 35.

If a Man declares of Trespafs in a certain Close abuttant || *super quoddam Molendin' in Tenura* §. S. if the Plaintiff does not prove his Abuttals, he is gone; and because he could not prove that the Mill was in the Tenure of §. S. the Jury being at Bar was discharged; for he fails in his Proof because he doth not prove it to be the Close distinguished and described in the Declaration, and so it doth

\* Wherefore he broke his Close and House, and other Enormities did to him. † From an indecent Behaviour. § Other Enormities did to him. || Upon a certain Mill in the Tenure of.

not

not appear that there was any Trespafs in the Close he has described.

If in Ejectment the Plaintiff declares for a Manor, he must prove the Attornment of the Tenants; for a Manor consists partly in Demesnes and partly in Services; without Services there is no Manor, and without Attornment there is no Service.

3 Mod. 36.  
Lit. §. 553.  
Rol. Abr. 293.  
Salk. 90, 91.  
Stra. 78, 106.

In Trespafs upon the Case against the Defendant for digging a Hole in the Way, whereby his Horse fell in, to his Damage; if the Plaintiff doth not prove the Way, and that the Defendant dug the Hole, he fails in his Proof of his Declaration.

Style 335.

If Trespafs were done the 4th of May, and the Plaintiff alledges the same to be done the 5th of May, or the 1st of May, when no Trespafs was done, yet if upon the Evidence it falls out that the Trespafs was done before the Action brought, it sufficeth; for the Time of the Injury is no more a material Part of any Injury than it is of a Contract; and therefore whether there is an Injury done or not is the Question, and not when it is done; but if there was no Injury done at the Time of the Action brought, then had the Plaintiff no Cause of Complaint, and so the Action at the Time it was brought was wholly groundless.

Co. Lit. 283. a.  
Gro. Car. 228,  
514.  
2 Rol. Abr. 680.  
pl. 3.  
L. E. 236. pl. 62.  
2 Sid. 308.  
Tri. per Pais,  
6th Ed. 394.

If a Man be said to assume the 4th of May, and he be then proved to be dead,

Shelton and  
diss, per Hol

R

and



and the Party be proved to assume another Day, it sufficeth. But if a Man bring Trespass against another, and lay it to be done the 4th of *May*, and the Party is proved to be dead, this discharges the Action, for a personal Action that complains of a Wrong done, dies with the Person.

IN an Action on the Custom for safe Carriage, Evidence of the Delivery and Charge to carry them safe, good, without saying whither, because it shall be intended to the Place where he usually came.

IN an Action for safe Carriage, if no Price be set, it shall be intended for the common Price, but if a special Agreement be set out to carry for 4*s.* an hundred, it must be proved that the common Rate is to carry for 4*s.* an hundred.

Secondly, Evidence on Not guilty for the Defendant in Trespass.

THE Defendant may prevail in this Issue.

FIRST, By making Title to the Land; for then he satisfies the Declaration, for he proves that he did not enter into the Plaintiff's Close, but his own; and consequently that is a very just Disproof of the Plaintiff's Declaration.

5 Co. 116.  
Gouldsb. 189,  
190.  
Moor 394, 395.  
Cro. Eliz. 460,  
461.

SECONDLY, By making Title to the Profits of the Land when he hath no Title to the

the Land itself; as this also falsifies the Declaration, for hereby the Defendant did not beat down the Plaintiff's Corn, but entered to take his own; and if the Defendant proves the Corn to be his own, the taking of it is no Manner of Trespass to the Plaintiff, and so the Defendant hath disproved the Fact laid in the Declaration: Now the general Rule is, that where a Man hath an uncertain Interest and sows the Land, and his Estate determines, yet he hath a Title to the Corn that he hath sown on the Land, though the Property of the Land is altered.

AND this upon these three Reasons.

FIRST, Because it is a publick Benefit that the Lands should be sown and cultivated, and all Things that tend to Plenty and Increase ought to have the uttermost Security that the Law can give it; for hence it is fit that they should suppose a Property in the Corn distinct from that of the Soil, and that this Property should be at the entire Disposal of the Owner distinct and separate from the Land, that all Encouragement possible might be given to Tillage, and that no Man might decline Cultivation under this Fear, lest the Profits should be swallowed by any Person that he disliked.

SECONDLY, When any Person hath sown, he hath gained a special Property in the Corn by his Labour and Industry, and there-  
R 2 fore

fore though his Property in the Soil changes, yet the Property of his Labour remains; and this arises from the natural Consideration of Property which was at first derived from Labour, for a Man's own Actions are most properly his own, and from thence all Ownership begins; for the very Value of the Soil is not more from the natural Product than from the Labour and Industry that Men have employed in their Cultivation; which will very plainly appear by considering the Difference between that in *England* and that in the *West-Indies*: If also over and above the natural Product of a cultivated Soil, Corn still adds a further Value to the Land, that the Value of the Land producing Corn surmounts the Value of a natural Product from another cultivated Soil, as much as that doth the Product of a waste and barren Soil, it follows that there ought to be another Property in the Corn distinct from that of the Land, in as much as there is a Labour in the acquiring and sowing the Corn distinct from the Labour whereby the Land was at first occupied and gotten; also there is a distinct Charge in sowing the Corn from the Money whereby the Land was purchased; from thence the Law in following Nature doth erect a distinct Property in the Corn different from the Soil.

THIRDLY, There is a Property in the Corn distinct from the Soil before the Corn is committed to the Earth, and that Property



perty is not lost by sowing it in a Man's own Soil: For I cannot lose the Property of what is my own by putting it in a Place which is my own also; but if I sow my Corn in another Man's Soil, it ceases to be mine, in as much as I set it in the Place of the natural Product of his Soil, and therefore it must belong to the Owner as the natural Product of the Soil did; and were it otherwise, Men would break in upon other Peoples Grounds and sow them, and keep Men out from the Disposal of their own Estates, and thereby they would raise a Property to themselves from another's Estate, and put the Owner to the Trouble of controverting it; because a Man expects a yearly Return of the Corn which he sows, it is reckoned Part of his personal Estate as the Corn itself was before it was sown. But otherwise of Timber Trees planted, for they must be supposed to be annexed to the Soil, since they were planted with the Prospect that they could not come to be of Use till many Generations afterwards.

IF Tenant for Life sows the Land and dies, his Executors shall have the Corn, and they may take it from off the Ground of him in Remainder, and if Trespass be brought there is good Evidence to discharge the Defendant *Not guilty*.  
Co. Lit. 55. b.  
5 Co. 116.  
Rol. Abr. 726,  
727.  
2 Bulst. 213.  
2 Inst. 81.

So it is if Tenant at Will sows the Land and the Lessor determines his Will.  
Co. Lit. 55.  
5 Co. 116.

BUT if Tenant at Will determine the Will by any Act of his own, he shall not have the Corn sown; for when he determines his Will, the Interest is in another, and therefore he can no more reap the Increase of his Corn, than if he had sowed in another Man's Ground, the Corn growing in the mean Time hindering the Owner from all natural Increase, and therefore to determine the Will is to relinquish the Corn, for to leave the Land is to leave the Profits of it.

Rel. Abr. 727.

Ibid. 726.  
5 Co. 116. b.  
Cro. Eliz. 460.  
Moor 394.

So if Feme Copyholder have Land \* *durante viduitate* and marry, the Husband shall not have the Corn, but the Lord; because she has determined the Estate by her own Will.

2 Inst. 81.  
Co. Lit. 55.  
5 Co. 116.  
Goulf. 189.

BUT if the Estate be determined by a compulsory, and not by a voluntary Act, there the Property of the Corn doth not alter and go to him that hath Interest in the Land, for the Law is, and ought to be so tender of every Man's Property, that he shall not be reckoned to part with it without a plain voluntary Act of his own Will, and consequently the Person who had the Property in the Corn shall not be supposed to quit it unless he doth some voluntary Act whereby he determines his own Estate in the Lands, and thereby parts with them.

5 Co. 116.  
Goldf. 190.  
Moor 394.  
Rel. Abr. 726.

THEREFORE if a Lease be made to Baron and Feme during the Coverture, and they be

\* *During her Widowhood.*

divorced

divorced \* *Causa Precontract*,<sup>\*</sup> yet shall the Baron have the Corn sown, because the Marriage determines by Compulsion.

So if Tenant at Will be outlawed, this determines the Will, because he hath forfeited all Contracts; but this being by Compulsion, the Property of the Corn doth not go to the Lessor, but to the King, to whom all his Chattels are forfeited. 5 Co. 116.  
Goult. 190.

BUT if a Lease were made till the Tenant did Waste, and the Tenant doth Waste, he shall not afterwards have the Corn sown, for here he determines his Lease by a voluntary Act of his own. 5 Co. 116.  
Goult. 189.  
Rol. Abr. 726.

IF a Man makes a Lease at Will, and the Lessor be outlawed, whereby the Will is determined, yet shall the Lessee have the Corn sown, and not the King; for here was no Act of the Lessee to determine the Will, or to alter the Property. 5 Co. 116.

IF Tenant for Life, or at Will, forfeit or break a Condition, they shall not have the Corn sown, for this is a voluntary Act within their own Power. Goult. 189.  
Cro. El. 469.  
Rol. Abr. 726.

BUT if a Woman who hath an Estate during Viduity makes a Lease for Years, and the Lessee sows the Land, and then the Woman marries, yet shall the Lessee have the Corn, for the Act of the Lessor, after the Goult. 189.  
Rol. Abr. 727.

\* By Reason of a Precontract.



Lease made, cannot alter the Property of the Lessee, for a Man's Property once lawfully vested in him, cannot be divested out of him by the Act of another.

2 Inst. 80.

20 H. 3. c. 2.

It seems also in Common Law, that if Tenant in Dower die, her Executors should have the Corn, for the Statute of *Merton* which gives the Power to devise it, was only made in Affirmance of the Common Law.

If a Man dies leaving Issue a Daughter, his Wife being \* *privement enseint* of a Son, and the Daughter enters and sows the Land, and then a Son is born, she shall have the Corn.

Co. Lit. 55.

If the Husband sows the Land of his Wife, and the Wife dies, he shall have the Profits.

Two Joint Tenants, one of them dies, the Corn sown goes to the Survivor, and the Moiety shall not go to the Executors of the Deceased; for they are supposed to carry on the Cultivation of the Soil by a Joint Stock, and in all Joint Stocks, except Merchants, there is a Survivorship.

Rel. Abr. 727.  
But quere.  
Co. Lit. 55.

If Husband and Wife are Joint Tenants, and the Husband sows the Land and dies, the Corn shall go to the Executor of the Husband; for this Land is not cultivated by a Joint Stock, but is wholly the Corn of the Husband, which Property seems not to be intirely lost by committing it to their

\* *Privily enseint.*

Joint Possession, no more than if it had been sown in the Land of the Wife only.

If a Woman seised in Fee or for Life Roll. Abr. 727. sows the Land, and then takes a Husband, and he dies before the Severance, the Wife shall have the Profits, and not the Executors of the Husband; for the Corn committed to the Ground is a Chattel real, that is annexed and belonging to the Freehold, and not a Chattel personal annexed to and transferred, and therefore without the Husband's Disposition of it during his Life, it belongs to the Wife and not to the Husband.

If a Baron sows the Land and dies before Braft. 96.  
Roll. Abr. 727. Severance, the Wife shall have the third Part of the Land so sown for her Dower; for if a Man hath all Corn Land, she shall not stay for her Subsistence for a whole Year till the Corn be removed, and from hence it was doubted at Common Law, if the Widow sowed the Land whereof she was endowed, whether her Executors or the Heir should have the Corn sown.

If a Man seised in Fee sows Copyhold Roll. Abr. 727. Lands and surrenders them to the Use of his Wife, and dies before the Severance, it seems that the Wife shall have the Corn, and not the Executors of the Husband; for this is a Disposition of the Corn, that being appurtenant to the Land, and since the Husband hath disposed of it during his Life, it cannot go to his Executors.

IF

Co. Lit. 55.  
Rol. Abr. 727.

IF Tenant by Statute Merchant sows the Ground, and after is satisfied by some casual Profit, yet he shall have the Corn.

Hob. 132.

IF a Man sows his Ground and dies before Severance, the Corn goes to the Executors and not to the Heir.

Hob. 132.  
Rol. Abr. 727.

IF *A.* seised in Fee of Land sows it, and then conveys to *B.* for Life, the Remainder to *C.* for Life, and *B.* dies before the Corn is reaped, *C.* shall have it, and not the Executors of *B.* for *B.* had not the Property of this Corn from his own Charge and Industry, but merely by the Donation of *A.* the Corn appertaining to the Land that was given, and for the same Reason, and by Force of the same Donation that *B.* had his Corn, *C.* is to have it after the Death of *B.*

Objection.

BUT why doth the Corn pass to the Donee as appertaining to the Soil, when the Property of the Soil alters; and yet shall not descend to the Heir as appertaining to the Soil, when the Property of the Soil remains in the first Owner?

Answer.

EVERY Man's Donation being taken most strongly against himself, shall pass not only the Land itself, but the Chattels that belong to the Land; but no Chattels can descend to the Heir, they go to the Executor; why this is accounted a Chattel we have shewn already.

*A.* seised



*A.* seised in Fee sows the Land and de- Winch 51.  
vifes it to *B.* for Life, Remainder to *C.*  
*B.* shall have the Corn sown, and not the  
Executors of *A.* for *B.* the Devisee, in rela-  
tion to the Chattels belonging to the Land, is  
put in the Place of the Executors by the  
Words of the Will, but if *B.* dies before  
Severance *C.* shall have it.

TENANT for Life Remainder in Fee, 5 Co. 85.  
Tenant for Life lets the Land for Years, Tri. per Pais,  
Lessee for Years is ousted, and Tenant for 6th Edit. 405.  
Life disseised, and the Disseisor lets the Cro. El. 463,  
Land for Years, and the Lessee of the Dis- 464.  
seisor sows it, and the Tenant for Life dies, 2 Inst. 81.  
the Tenant for Years of the Disseisor shall Gouldf. 143,  
have that Crop sown, and not the Remain- 144.  
der Man; for the Tenant for Years of the  
Disseisor hath Right to the Profits that he  
hath sown against any Person but him who  
had Right to the Land itself, and that was  
the Lessee of Tenant for Life, and he should  
recover against the Lessee of the Disseisor all  
the Profits that he made of the Lands, and  
therefore the Remainder Man cannot recover  
any Part of it, for then the Lessee of the  
Disseisor should be doubly charged.

IF *A.* seised in Fee sows Land, and gives Hob. 132.  
it to *B.* for Life, Remainder to *C.* for Life,  
and they both die before Severance, it shall  
go to *A.* for when the Force of the Dona-  
tion ceases, the Property returns where it  
was.

IF

Roll. Abr. 728.  
Co. Lit. 55.

IF Tenant for Life sows any Grain or Roots of annual Profit, they go to his Executors, and not to him in Remainder. \* *Causa qua supra.*

IF he plants Oak, they go to the Remainder Man. \* *Causa qua supra.*

Co. Lit. 56.  
Roll. Abr. 727.

IF he increases the natural Product either by trenching or by sowing of Hay-seed, this shall go to him in Remainder, for his Executors have no Property in the natural Product, and Improvement is undistinguishable from the natural Product.

Cro. Car. 515.

BUT Hops reared on ancient Stocks shall go to the Executor of Tenant for Life, and not to the Remainder Man, for the Poles, the Hills, and the Dung, whereby the Product is made, are the proper Chattels of Tenant for Life; otherwise of Garden Roots that cannot be taken up without digging the Soil of the Heir.

Co. Lit. 55.

Noy 149.  
Keiw. 159. b.  
160. a.  
Co. Lit. 46.  
Dy. 285. b.

WHOEVER hath the Property of the Corn may give it in Evidence on Not guilty, or may maintain a Trespass † *Quare Clausum fregit*, for to that Purpose the Soil is his.

Bro. General  
Issuē 81.

UPON Not guilty in Trespass, the Defendant cannot give a Licence in Evidence, for this supposes the Act to be done and justifies its Lawfulness, and all such Matters

\* For the Reason above.

† Wherefore he broke his Close.

ought

ought first to be exhibited to the Court to judge of.

So on Not guilty the Defendant cannot give in Evidence the Defect of Inclosures, for the same Reason. Co. Lit. 283.

IN Trespass on Not guilty the Defendant gives Evidence that he came into the Plaintiff's Ground to glean; this ought to have been pleaded, for it confesses the Act of Trespass and justifies it as an Act lawful for him to do; and therefore it ought to be first exhibited to the Court to judge of, whether it be lawful or not; but if it had been pleaded, it had been a sufficient Justification, for by the Custom of *England* the Poor are allowed to glean after the Harvest, which Custom seems to be built on a Part of the *Jewish* Law that allowed the Poor to glean, and made the Harvest a general Time of Rejoicing. Tri. per Pais, 6th Edit. 399. L. E. 225. pl. 31.

IN Trespass on Not guilty the Defendant cannot give in Evidence that he came into the Plaintiff's Close to take his own Horse, but this ought to have been pleaded; and on such a Plea that the Defendant came to take his own Horse, the Evidence was that the Plaintiff, as Lady of the Manor, took the Defendant's Horse as an Estray, and the Defendant took him away after he had been cry'd and marked, without paying for his Meat; and 'twas ruled that this taking was well enough, and the Plaintiff has an Action on the Case for his Meat; for the Property of Tri. per Pais, 6th Edit. 394. 395.



of the Horse is still in the Defendant till the Year and Day are past, and when a Man hath Property, it is lawful for him to take it; for the very Action of Property is Right to possess and use the Thing which he claims.

Tri. per Pais,  
6th Edit. 395.

IN Trespass the Defendant cannot give in Evidence a Right to a Way, but he ought to have pleaded it, and if after pleading he shews in Evidence a Right to the Way by Grant over the Plaintiff's Ground from such a Place to such a Place, though the Defendant afterwards purchases more Ground whereby he makes a further Use of the Way, yet it is well enough and within the Grant; for if I go but between the same Towns I may afterwards pass wheresoever I please.

Co. Lit. 57.

IN Trespass all the Defendants must be Principals, for no Man can, by commanding a Trespass, give any Man Authority to do it, therefore no Man is guilty but he that acts in it, and any other Person is not guilty at all; but in Felony the very commanding it is unlawful, for whoever is at the Act is a remote Cause of the Felony, and so ought to be punished where the Act requires an Example \**in Terrorem*; for formerly the very Intent of Murder was Murder, and so the Party was punished as a Murderer: After that altered, because it was not thought reasonable that the Party should be punished unless the Act followed, and from thence came the Notion of Principal and Accessary; but in Treason, the

\* *As a Terror.*

Intent is still Treason, and therefore they are all Principals; and in Trespafs, the Intent to trespafs was ever reckoned a Trespafs, and therefore there are no Accessaries.

IN Trespafs for the Mesne Profits after the Recovery in Ejectment, the Defendant cannot insist upon any Title that was over-ruled on the Trial in Ejectment, for once settling the Title shall be conclusive to the same Parties ever after, to avoid the Trouble and Charge in Contention; but if the Defendant make a new Title, he ought to be heard, for the Defendant ought not to pay any Money in his own Wrong where he hath a Title.

Sid. 239.  
Tri. per Pais,  
6th Edit. 396.

TRESPASS of Assault and Wounding, the Defendant pleads \* *Non cul.* as to the † *Vi et Armis*, and as to the Assault he makes justification of § *molliter manum imposuit*; the Justification shall be first tried, and then the † *Vi et Armis*; for possibly the using of Force may be in his own Defence, and therefore just and lawful, and such a Force as the Law doth not oblige him to defend, and therefore that ought to appear first on the Justification; but if the Issue of \* *Non cul.* had been to the Wounding, then the Plea might have been first try'd, because he doth not pretend to justify the Act, and so it might very properly be try'd first whether it were or no.

Ibid. 398.

\* Not guilty.  
upon him.

† Force of Arms.

§ Putting his Hands gently

IN

Ibid.

IN Assault and Battery the Defendant ought to plead that it was his own Assault, and cannot give it in Evidence on the general Issue: If the Defendant pleads that it was his own Assault, and proves that the Plaintiff bent his Fist at him, or that he laid Hand to his Sword, this is Proof of an Assault; for where any Man shews Signs of Violence 'tis a sufficient Provocation to resist in his own Defence, and the Defendant need not stay till a Blow is actually given, before he provides for his own Defence, for then it may be too late to make any Resistance.

2 Keb. 545.  
L.E. 235. pl. 60.

BUT if a Man clenches his Fist, or lays Hands upon his Sword, with this Declaration, That were it not Assizes Time he would tell the Plaintiff more of his Mind; this is no Assault, because he declares his Intent not to assault, and then his clenching his Fist and laying his Hand upon his Sword, cannot be reckoned any Signs of a Design of Violence, but only of Passion, for his bare Actions are not to be taken as Signs of his Mind, when he hath in Words expressed himself to the contrary.

2 Keb. 545.  
L.E. 235. pl. 60.

IF a Man punch another with his Elbow in earnest Discourse, this is no Assault, for 'tis no Sign of Violence intended, or of any Hurt, and therefore doth not call for Defence, nor is it necessary that it should be obviated by a Resistance.

IN



IN an Action for false Imprisonment on <sup>Ibid.</sup> Not guilty, the Defendant gives in Evidence that he took the Plaintiff by Virtue of a Warrant from a Justice of Peace; and this is within the Statute of 7 Jac. c. 5. though <sup>7 Jac. c. 5.</sup> the Defendant be no Officer, for it says, any others that do any Thing by Virtue of the Command of the Justice of Peace.

IF the Defendant be no Officer he is not <sup>Tri. per Pais 437.</sup> bound to execute his Warrant, because the Justices have no Power to compel an Execution but on their own Officers, who are put in and liable to execute the Business of Justice; but the Defendant may justify the doing the Thing which the Justice hath Commission to, as a Servant to the Justice of Peace, for the Justice may execute his Warrants by his own Servants if he pleases; so a Constable is not compellable to execute a Warrant out of his own Liberty, because he is only appointed by the Law as an Officer to keep the Peace within that District only, but he may execute any Warrant where the Justice hath Commission, as any private Man may do.

IN Trespass the Defendant must justify by <sup>Clayt. 54.</sup> Reason of a Prescription, but cannot give it in Evidence on Not guilty: If the Defendant justify by a Prescription to tether \* *Equos & Boves*, he may give in Evidence the tethering of Mares and Cows, for the Feminine Gender are within the Words of the Prescription.

S

IN

\* *Horses and Oxen.*

Leon. 307.

L. E. 221. pl. 21.

Keilw. 61. b.

2 Rol. Rep. 682.

IN Trespass upon Not guilty the Defendant may give in Evidence, that the Right of Freehold was in J. S. and he entered by his Commandment; for if the Defendant enters by the Command of J. S. 'tis the same as if J. S. had entered, and consequently, if J. S. hath the Right, the Estate is vested in him by the Entry, and consequently, the Defendant is no Trespasser on the Plaintiff, and by such Evidence as this he plainly falsifies the Declaration of the Plaintiff, for he proves that he did not break his Close as the Declaration sets forth; 'tis therefore proper for the general Issue.

2 Vent. 151.

L. E. 170. pl. 56.

THERE is a great Difference between Torts and Contracts. When the Action is upon a Tort, one may be found guilty and the rest acquitted; and when the Action is brought upon a Contract, all or none must be found Debtors; for every Trespass is of its own Nature joint and several, for I may charge the Defendants under this Relation, as they aided and assisted one another, or as each by his own proper Force committed the Injury, so that every Trespass is in the very Allegation several as well as joint, for it supposes a Man to have used his own proper Force as well as to have assisted his Companion, and if a Man be found guilty of one Part of the Charge, but not of the other, yet the Injury ought to be redress'd; but a Contract may be joint only and not several, and when a Man declares of a joint Contract, and

and proves a several one, he doth not prove the same Contract that he hath alledged in his Declaration.

IN an Action on the Case brought against an Inn-keeper for suffering the Goods of the Plaintiff his Guest to be taken out of his House, and upon Not guilty pleaded, the Defendant may give in Evidence that he told the Plaintiff that his House was full, and that he could not lodge him, and that notwithstanding the Plaintiff went in and lodged in his House; for this Evidence falsifies the Declaration, for it proves that there was no Injury done to the Plaintiff as Guest to the Defendant.

Bendl. 18. pl. 72.  
Dy. 158. b.  
pl. 32.  
Ander. 29.  
pl. 69.  
Rol. Abr. 3.  
L. E. 185. pl. 26.

Thirdly, The Issue of Not guilty in Trover.

ON this Issue two Things are to be proved;

*First*, The Property.

*Secondly*, The Conversion.

FIRST, The Trover, that is the Finding that the Goods came to the Plaintiff's Hands, and were in his Possession.

Rol. Abr. 6.

IN Trover against Husband and Wife, the proving of the Goods in the Possession of the Wife is sufficient, for their Property is but one, and the Possession of the Wife is the Possession of the Husband also.

Ibid.



2 Bulst. 311,  
312.

IF Goods be delivered by the Owner to A. to keep, and he converts them to his own Use, this is sufficient Evidence of a Trover, for though he comes by the Possession never so lawfully, yet if he converts another Man's Property, the Owner must be redress'd.

Cro. Jac. 244,  
245.  
2 Danv. Abr. 28.  
pl. 6, 65. pl. 10.  
Yelv. 178.  
Bulst. 29.  
Noy 137.

So if Goods be pawned, and the Owner tender the Money, and the Bailee refuses to deliver them, this is Evidence of a Trover, for when any Man has a naked Possession without a Right of converting those Goods, the Party may bring Trevor, for the Words of the Declaration are, \* *Ad Manus & Possessionem per Inventionem devenerunt*; so that coming to his Possession is the material Part of the Charge, and if the Plaintiff proves that they came to his Possession any other Way, it suffices, for 'tis not enough for the Defendant to say, that he had the Goods, though not † *per Inventionem*, no more than to say that a Bond is his Deed, and deny the Date.

### Secondly, Conversion.

10 Co. 56, 57.  
2 Sid. 127.  
2 Bulst. 314.  
Cro. El. 97, 495.  
Cro. Jac. 245.  
Cro. Car. 262.  
Vent. 401.  
Hob. 187.

IF a Man request his Goods, and the Person who has the Possession denies to deliver them, this is good Evidence of a Conversion; for to what End should a Man deny

Roll. Rep. 59, 60. Hutt. 10. 2 Bulst. 303, 310.

\* That they came to the Defendant's Hands and Possession by finding.  
† By finding.

me

me my own, if he himself did not make use of it; so that upon such Evidence as this, it is to be presumed that the Defendant hath converted them to his own Use.

Rol. Abr. 5.  
Gouldf. 152.  
Moor 460.

*Rolls* makes a Distinction where Goods came to the Defendant's Possession by his own Act, and where by the Bailment of the Plaintiff; and that in the first Case, a Request and Denial is a Conversion, but not in the last Case; but this does not seem to be Law, for in both Cases the Request and Denial is no Conversion, but only Evidence of a Conversion.

BUT though the Request and Denial be Evidence to a Jury of a Conversion, yet it is no Conversion; for the Jury are Judges of probable and improbable, and they, on the Circumstances mentioned, may think it rather probable that there was a Conversion than otherwise; but if the Jury refer these Circumstances to the Court, the Court cannot adjudge that there is a Conversion, for the Court are not Judges of the Probability of a Fact, but of the Law; and there are not those Circumstances that do necessarily amount to a Conversion, though they are such Circumstances as would make a reasonable Man believe that there was a Conversion, for the bare denying of the Thing without using of it, is not in Law a Conversion of it to my Use; for a Denial \* *ex vi termini* doth not amount to an using of the Thing

10 Co. 56, 57.  
2 Sid. 127.  
Cro. El. 495.  
2 Bulst. 314.  
Vent. 401.  
L. E. 177. pl. 7.  
Hob. 187.  
Hut. 10.  
Cro. Car. 262.  
2 Salk. 655.  
Lev. 173.  
Danv. Abr. 21.  
Mod. 244.  
2 Mod. 245.  
3 Mod. 2.  
5 Mod. 426.  
6 Mod. 212.  
2 Show. 161,  
179.

\* From the Term itself.

demanded, it only makes a Presumption of Fact, that I have used it.

2 Bullst. 374.  
 Rol. Rep. 132.

If Trover be for bare Money, and a Request and Denial be proved, this is so strong a Presumption of the Conversion, that nothing can be proved to the Contrary; for the Presumption must stand till the Contrary be proved, and the Contrary to this Presumption can never be proved, for all Money being exactly alike, that the individual Money found was not converted can never be proved.

*Ibid.*

BUT if Trover be for Money in a Bag, though the Defendant doth deny to deliver it, yet he may prove that there was no Conversion, for if he lays the individual Money sealed in the Bag in the Place where he first had it, and hath Witnesses of its Continuance there without Removal, this is no Conversion, and such Evidence will destroy the Presumption that arose from his Denial.

2 Rol. Abr. 310.

So if the Owner requests a Man to deliver a Beam of Timber, or a Sow of Lead lying in his Land, and he denies to do it, this is \* *prima facie* an Evidence of Conversion, tho' less strong, because the Defendant in this Case could not deliver it without Trouble and Charge to himself, and that might be the Reason of his Denial, and not because he had applied it to his own Use; and in this Case if the Defendant proves that the Beam

\* *At first.*

or



or Sow is there still, after his Denial, this plainly disproves his Conversion.

WHERE the Defendant hath a general Property, he may give it in Evidence on the General Issue, for the General Issue is putting the Plaintiff to the Proof of the Fact laid in the Declaration, Part of which is that he hath the Property of the Thing in Demand, and the Defendant converted it to his own Use; so that the Plaintiff must prove a Property in him, and the Defendant may prove a better Title in himself to falsify that Claim; and this is good Evidence on the General Issue, for it disproves the Fact laid in the Declaration, for it proves that the Plaintiff had not the Property, and that the Defendant did not convert it, for no Man can be said to convert that which was his own before, so that for the Defendant to make to himself a general Property, is proper on the General Issue, because it doth falsify the whole Charge of the Declaration.

If a Man take my Horse and ride him, Rol. Abr. 5. and re-deliver him to me again, I may have an Action of Trover against him notwithstanding the Re-delivery, for he had him in his Possession and did convert him to his Use, and his Re-delivery is only an Evidence in Mitigation of the Damage.

If I deliver Goods to a common Carrier Rol. Abr. 6. to deliver at such a Place, and these Goods are stolen from the Carrier; this is no Conversion

version in the Carrier to maintain this Action of Trover and Conversion; for the stealing away the Goods can never be reckoned (by any Manner of sensible speaking) a Conversion of Goods to the Carrier's Use.

Ibid.

BUT in this Case an Action may be brought on the Custom of *England*, that Carriers should safely keep all the Goods that are delivered to them; and this Evidence will maintain that Action.

Ibid.

THE King's Purveyor takes Beds and appoints the King's Servants to lie in them; this is no Conversion to his own Use, but to the Use of the King, and therefore may be given in Evidence to discharge the Defendant in an Action of Trover.

38 El. B. R.  
per Fenner.  
Str. 576.

IF the Nature of the Thing be altered, this is good Evidence of the Conversion; as if Leather be taken and made into Shoes; but this is no good Evidence on the Writ of Detinue, where the Demand of the Thing is in Specie, and where no Conversion is alledged.

Tri. per Pais  
456.  
Clay. 57.  
L. E. 177. pl. 10.

OATS were taken from the Owner and carried to the Mill to make into Meal, and before it was done the Owner comes and prohibits the Miller, who notwithstanding proceeds to grind it, this is a Conversion in the Miller, for it is an Alteration of the Property by him in whose Possession it is, contrary to the Will of the Owner.

A MAN lends his Horse to a special Purpose and the Defendant abuses him, this is <sup>Tri. per Pais 456.</sup> no Evidence to maintain Trover, for though the Horse be abused in the Journey, this is not a Conversion to the Defendant's Use contrary to the Will of the Owner in the Delivery.

BUT this is Evidence to maintain a special Action on the Case though not a Trover; for the Abuse is not a Conversion to the Defendant's Use, for the Abuse arises by Negligence, which is no Use at all; and the Conversion is an Use contrary to the Design of the Bailment, which is an Act of the Defendant, and so they cannot be Evidence one of another.

BUT if a Man lend his Horse to go to *York*, <sup>2 Bulst. 309.</sup> and he goes to *Carlisle*, this Evidence will maintain Trover, for this is an Act contrary to the express Bailment, and consequently is a Conversion of the Plaintiff's Horse in the Defendant's Possession to his own Use.

TROVER for an Horse of fifteen Pounds <sup>Tri. per Pais 454.</sup> Value, the Jury give but three Pounds Damages, thinking the Plaintiff had his Horse again; a new Action lies for Damages for the Horse, where Evidence may be given that the first Verdict was only for the Conversion, and not for the Damages for the Horse itself.

IN



Tri. per Pais  
454.

IN Trover by an Administrator where the Conversion was in the Time of the Intestate, the Plaintiff must shew his Letters of Administration, for he must in this Case prove Possession in the Intestate, and that he is his Representative; but where the Conversion is after the Death of the Intestate, he need not shew them, for there he need do no more than prove the Possession in himself, which is a good Proof of a Title \* *prima facie* against all Persons that cannot shew a better Right, and by being taken and converted out of his possession he will maintain his Action.

2 Sid. 264.

IF an unjust Taking of any Goods be proved, as the Taking my Hat off my Head, this is good Proof of the Conversion, though there be no Proof of a Demand and Refusal; for when I prove the taking away of any Thing from me without my Leave or Allowance, the Person must be supposed to take it to his own Use, for it cannot be supposed to be taken for my Use, that is taken away from me without my Consent, and consequently this is a Proof of converting my Property to his own Use.

Raym. 472.  
2 Vent. 169.

IF a Man brings Trespass and recovers, he can never afterwards maintain Trover, but the former Action is a good Plea in Bar to the latter; but if a Man brings Trespass, and Judgment be given against him, he may

\* *At first appearance.*

main-

maintain Trover afterwards; for if the Taking be tortious, he may maintain Trespass as well as Trover; for where there is a very Wrong in the very Taking, this is in the Understanding of the Law, a Taking with Force and Arms, and therefore in such Cases as these, the Party may punish either the Taking or the Conversion of them, and consequently this Evidence will maintain both Actions, either Trespass or Trover: But if a Man seizes the Goods by Right, but detains them by Wrong, there he cannot bring Trespass which punishes the tortious Taking of any Thing; but he ought to bring Trover where the Gift of the Complaint is for Conversion: Now where two Actions are for the same Thing, one is a good Plea in Bar of another to avoid a needless Vexation, but where the two Actions lie for different Things, as it is in Trespass and Trover, there the first cannot be pleaded in Bar of the last, for possibly on the Trespass I might prove the Taking my Goods, but not tortiously, and so the Trespass did not lie, but Trover only; and because I bring an Action that is not proper, and I fail in that for that very Reason, because it is not proper, it is not thence to be argued that I should fail on that Action which on all Hands is allowed to be proper; but if I fail in an Action that is proper for me, it is then consonant to Justice that I should not begin another on the same Ground, for then from the Justice of the former Determination it is presumed to be a needless Vexation.

Lynch and Mercer.  
Trial at Bar in the Common Pleas in Ireland before Ch. J. Singleton.

IN

Per Holt.

IN Trover, the Plaintiff must have Property, not so in Trespass, for in Trover you admit the Defendant to have Possession, and therefore you must prove a better Right; but in Trespass you have the Possession, for it supposes a Violation of the Possession, and this is sufficient in Law against a wrong Doer.

Secondly, Of Not guilty in Criminal Matters.

2 Hawk. P. C.  
435. sect. 32.  
Salk. 288.  
H. H. P. C. 361.  
2 H. H. P. C.  
179, 291.  
Inst. 283.  
2 Inst. 318.  
3 Inst. 230.  
4 St. Tri. 9.  
Tri. per Pais  
477, 478.  
H. P. C. 264.  
Kel. 16.

IF the Indictment be of Felony at one Day, and the Evidence be of Felony at another Day, yet the Jury may find generally against the Prisoner; for the Question is not when the Fact was done, but whether it was done or not; and the Jury sworn, \**ad veritatem dicendam*, must find the Fact, which whensoever it was done, deserves the same Punishment.

H. H. P. C. 361.  
2 H. H. P. C.  
179.  
3 Inst. 230.

BUT if the Jury give a general Verdict where the Felony is proved at another Day than that laid in the Indictment, there the Party may falsify, for so far as any Record is conclusive and undeterminate, so far you may falsify, for thereby you do not falsify the Determinations of the Law, which in all Laws ought to be sacred and inviolable.

Now if a Felony is alledged at such a Day and found to be done, it does not follow that it was done at the Day, for if done at another Day, yet the Verdict and Determina-

\* *To speak the Truth.*



tion of the Law ought to be perfectly the same; so that the Time when the Felony was done is not determined and adjusted, as to that the Record is conclusive, and so far a Man is at Liberty to make his Proofs, because the right Owner thereby preserves his own Property, and doth not invalidate the Determination of the Law, for what now comes into Proof was before undetermined; but if the Time when the Fact was committed were found by the Jury, all Parties are concluded, and the Forfeiture must relate thither.

If the Indictment lays the Felony at one Place, and the Evidence proves the Fact done at another Place in the same County, this will maintain the Indictment; for all Criminal Matters were anciently tried in their proper Leet, as all local Actions were in their County Courts, but transitory Actions, where Time or Place is not material to the Essence of the Contract or Injury, are triable any where.

Salk. 288.  
2 H. H. P. C.  
180, 291.  
H. P. C. 264.

THE Party had Goods whereby he might be summoned, now all Commissions \* *Oyer et Terminer* are made after the Policy of the old Law according to the ancient Jurisdiction of the Leet, and therefore cannot try any Thing where the Fact arises out of the County, (*vide the Book of Courts*) but may try all Facts within the same County, for the Place is but an immaterial Circumstance.

\* To hear and determine.

As

2 H. H. P. C.

185, 291.

9 Co. 67. b.

2 Inst. 319.

H. P. C. 265.

3 Inst. 50, 135.

L. E. 277. pl. 35.

2 Hawk. P. C.

437. sect. 37.

As Time and Place are immaterial Circumstances, so are also the Instruments wherewith the Felony is committed, and therefore if the Indictment be for killing with a Dagger, and the Evidence prove a killing with a Staff; so if the Indictment be for killing with one Sort of Poison, and the Evidence proves a killing with another, such Evidence maintains the Indictment, because the Proof of the Instrument wherewith the Fact is done, is not absolutely necessary to the Proof of the Fact itself.

Co. Lit. 283. a.

ON an Indictment for Murder, Self-defence ought to be given in Evidence, and ought not to be pleaded, because nothing can justify a private Man's killing another.

2 Inst. 319.

2 H. H. P. C.

185, 291.

3 Inst. 50.

9 Co. 67.

L. E. 277. pl. 35.

2 Hawk. P. C.

437. sect. 37.

H. P. C. 265.

BUT if a Man be indicted of poisoning, and the Proof be of stabbing, this Evidence doth not maintain the Indictment, because this is the Proof of a distinct Fact, and distinct Sort of Death, for the Death that arises from outward Violence, cannot be intended the same with that which arises from an inward Application; now the Death proved, and the Death alledged, must be by the same Instruments, whereby it may appear they are not proved different from what was alledged; Facts also differ where the Actions differ, as the Act of administering Poison, and the Act of stabbing, are plainly distinct Actions in the Actor; but the Act of administering Poison is the same, whether the Party gave Henbane or

or Arsenick; so the Act of striking is the same, whether with a Staff or with a Dagger, and so these are not distinct Facts.

INDICTMENT that *A.* gave the mortal Blow, and that *B. C.* and *D.* were \* *Presentes & Abettantes*, and the Evidence is that *B.* gave the mortal Blow, and that *A. C.* and *D.* were \* *Presentes & Abettantes*, this maintains the Indictment; for when all are present, they are all Murderers as if they themselves had actually struck, so all are reckoned to have struck, and he that actually gave the Blow is but the Instrument to the rest.

H. H. P. C. 437, 463.  
Plowd. 98, 100.  
9 Co. 67. b.  
Salk. 334, 335.  
3 Mod. 121.  
2 H. H. P. C. 185, 292, 344, 345, 437. sect. 39.  
L. E. 277. pl. 36.  
Tri. per Pais 471.  
H. P. C. 265.

BUT if two Persons are indicted as Principals, and the Evidence proves one Accessary, he must be discharged upon the Indictment, because he is not proved to have done the Fact, which is the Crime laid in the Indictment, but to have abetted the doing of it; and they came to be distinguished when the Intent of the Murder was not allowed to be Murder, as it formerly had been, unless the Act actually followed, for anciently the Intent to murder made the Crime, as it doth this Day in Treason, where there can be no Accessaries.

L. E. 278. pl. 40.  
H. P. C. 266.

IF a Woman was indicted for killing her Bastard Child, formerly the Evidence ought to have been that she actually killed it, otherwise Murder was not positively proved, for that the Child is dead, is no positive Evi-

H. P. C. 266.  
Ante 156.  
Kel. 32, 33.  
L. E. 278. pl. 41.  
2 H. H. P. C. 288, 289.  
L. E. 278. pl. 41.

\* *Present and Abetting.*

dence



dence that the Mother killed it; for in *Matters of Life* they required such Evidence of the Fact being committed, that the Contrary could not be supposed; now in this Case the Child might have been Still-born; but because Mothers to cover their Shame used to kill their Bastard Children, now by the 21 *Jac. 1. cap. 27.* the very endeavouring to conceal the Death of the Bastard Child is Evidence of Murder, unless she can contradict it by other Proof, and prove at least by one Witness that the Child was Still-born.

Hawk. P. C. 77.

sect. 4.

H. P. C. 58,  
266.

Kel. 33, 55.

Bullst. 87.

Jon. 220.

See Skin. 666,

667, 668.

3 Lev. 266.

Salk. 542, 543.

Al. 43, 44, 47.

Cro. Jac. 282.

See H. H. P. C.

467 to 470.

Godb. 154.

pl. 204. Styl. 86, 468. L. E. 277. pl. 39. 2 H. H. P. C. 292.

If a Man be indicted on the Statute of Stabbing, 1 *Jac. 1. cap. 8.* and the Evidence is that the dead Person struck first, whereby he is out of the Statute, yet this will maintain a general Indictment for Manslaughter, for this is an Indictment at Common Law as well as by the Statute, and though the Prisoner proves himself out of the Statute, yet he is not out of the Charge in the Indictment.

9 Co. 67. b.

INDICTMENT of Murder, and it be proved that the Words arose upon a Provocation, here is Proof of the Fact without the Circumstances of Malice alledged in the Indictment, and so the Jury may find him guilty of Manslaughter, which is alledged in the Indictment, without the Aggravation of Malice which makes it Murder.

IN-

INDICTMENT of Murder \* *ex malitia pre-* H. P. C. 266,  
*cogitata*, and the Evidence is of killing with- 267,  
 out Provocation, the killing an Officer, or 9 Co. 67. b.  
 that the Party was committing an unlawful L. E. 277 pl. 38.  
 Act, and that Death ensued to Somebody up- Cro. Jac. 280.  
 on that Action, if the Act was deliberate, Hawk. P. C. 80.  
 and tended to the personal Hurt of any one, sect. 18, 19, 83.  
 this is Proof of a Murder, for in these Cases, sect. 40, 41, 84.  
 the Law implies the Circumstance of Malice; sect. 42, 43.  
 this Implication of Law is for the Defence Kel. 127, 129,  
 of its Officers and of Mankind; for all Ma- 130.  
 lice is a secret Quality of the Mind, and it H. H. P. C. 451  
 is the Fact only appears and is able to be to 474.  
 brought to Proof, and it is from the Circum-  
 stance of Fact that a Man must collect the  
 Offence of the Mind; now when a Man kills  
 another, that is † *prima facie* so ill-natured  
 and bloody an Action that 'tis presumed to  
 be malicious, and therefore the Offender to  
 cover himself from the Supposition that the  
 Law has made in Tenderneſs to Mankind,  
 must ſhew ſome Provocation or ſome Acci-  
 dent in Excuse of the Fact; and if he cannot  
 thus mollify or excuse the Action, the Sup-  
 position of Law remains, and he ought to be  
 punished with certain Death.

Secondly, The second Issue is, § *Nullum fecit*  
*vastum.*

If a Man brings an Action of Waste, 5 Co. 119.  
 upon the general Issue of § *Nullum fecit vastum*, Co. Lit. 53, 283.  
 2 Rol. Abr. 682.  
 See 2 Sid. 225.

Mod. 94. Lev. 309 to 312. 2 Saund. 252 to 259. 3 Keb. 8.

\* Of Malice prepenſe. † At first Appearance.  
 § He committed no Waste.

T

the

the Defendant cannot give in Evidence that the Houses were repaired and the Waste set right before the Action brought, for this confesses the Waste and avoids the Action, by shewing that it is not lawful for the Plaintiff to bring his Action where the Injury is already redress'd, and on the general Issue the Plaintiff denies any Cause of Action.

11 H. 8. 1. b.

So upon this Issue the Defendant cannot give in Evidence a Licence to cut down Trees, for this is to confess and not to deny the doing of the Waste.

12 H. 8. 1. a.  
Co. Lit. 283. a.  
Jones 240.

BUT the Defendant may give in Evidence that his House was ruinous at the Time of the Lease made, that it fell by the Wind, or by Tempest, because this Destruction arises in the first Case by the Act of the Plaintiff, and in the last by the Act of God, and therefore it was no Waste at all; and when the Defendant proves that there is no Waste, he falsifies the Declaration, which is proper for the general Issue.

12 H. 8. 1. a.  
Co. Lit. 283.

So the Defendant may give in Evidence that the House was burned by Accident, for this also is no Waste, because it cannot be supposed within the Party's Power to prevent.

12 H. 8. 1. a.  
Doct. Plac. 199.  
Co. Lit. 283.

BUT if the Defendant cut Timber and lay it out in Repairs, he cannot give that in Evidence on the general Issue, but he ought to plead it specially, for this Evidence confesses and avoids the Declaration, and it admits



mits the Fact of the Declaration, but brings those Circumstances in, which shew the Fact may be lawfully done, and these for the foregoing Reasons ought to be offered to the Court.

BUT it may be said that this Evidence falsifies the Declaration, in as much as it proves that the cutting of the Timber is not the Disinheritance of the Lessor, and so it may be given in Evidence on the general Issue. Objection.  
12 H. 8. 1. 10

If you admit any Fact, you allow all the Consequences of that Fact; now when the Defendant's own Evidence does attest the cutting of the Trees, he must allow the Consequences of that Fact when it is to the Lessor's Disinheritance; for on the Issue nothing but the Truth of the Fact in the Declaration can be called in Question; you cannot therefore on this Issue allow the Truth of the Fact, and yet offer it to the Jury, and deny all the Consequences of the Law, attending upon the Fact, for that is improper for the Jury who are not Judges of the Law, and therefore must be offered to the Court who are, and consequently notwithstanding this Objection ought to be pleaded. Answer.

*Thirdly, The third Issue is, \* Nul tiel Tort, null Disseisin.*

UPON this Issue a Man cannot give a Release in Evidence made after the Disseisin committed, but it ought to be pleaded, for Co. Lit. 281.  
Jenk. cent. 18.  
Caf. 35.

\* *No fact Wrong, no Disseisin.*

this Evidence admits the Disseisin, and at the same Time shews that it was not lawful for the Plaintiff to bring his Action; and so it is good Matter of Justification.

Co. Lit. 283. BUT if the Release had been before the Disseisin, then it had been good Evidence, as if a Man seised of a Rent-charge releases the Rent and then demands it, and it is denied, this Release is good Evidence on the Issue of \* *Nul tiel Tort, nul Disseisin*, because now here is no Seisin or Freehold of the Rent in Being, and therefore there could be no Disseisin of it.

Hob. 39.

IF a Man brings an Affize for Common of Estovers when the House is down to which the Estovers belong, the Defendant may plead † *Nul Tort, nul Disseisin*, and give this Matter in Evidence, for there is no Wrong, nor no Disseisin if it become imposible by the Party's own Fault, that the Estovers should be rendered to him.

#### Issue of § *Nil Debet.*

WHERE the Debt arises by Specialty, it cannot be dissolved but by Specialty, but where the Debt arises by Act || *in Pais*, it may be dissolved by shewing any Act || *in Pais* in Evidence; as if a Debt arises by parol Agreement, it may be dissolved by Payment without any Writing concerning it; for every Contract is supposed to have Continuance, un-

\* *No such Wrong, no Disseisin.* † *No Wrong, no Disseisin.*  
§ *He owes nothing.* || *In Fact.*

less destroyed by a Contract of as high a Nature.

THIS Issue is twofold, either \* *per Legem* or † *per Patriam*.

FIRST, \* *per Legem*, and that is Law-wager: This was first invented by the Clergy to purge themselves from Criminal Prosecutions, and was so managed by them as that it gave them a greater Freedom from Punishment than other People; but they still pretended to these two Rules, that if the Crime were manifest, they would not allow Purgation, and 'twas required that the Compurgators themselves should be honest. From the Clergy it came over into Civil Prosecutions upon this Ground, that if a Man thought another of that fair Character that it was fit to trust him with Money without the Solemnities of a Deed, it was but fit he should trust his Conscience with the Payment of it, for there might have been such a secret Payment that the Debtor could not have proved; and upon this Foundation it was that a Man could not wage his Law against an Infant, for the Contract did not begin on that discretionary Trust that it doth when made with a Man of full Age; the same Law also when a Man gives Money to another to pay me, I may charge him as my Receiver, and he shall never wage his Law, because the Trust was never reposed in him by me who am the Plaintiff in the Action.

Decret. Lib. 5.  
Tit. 34.

\* *By Law.*

† *By the Country.*



IN this Invention the Clergy seem to comply with the *Gotbick* Humour, and whereas in their Trials they had pitched upon a Decision by twelve, so also they thought it proper to form this sham Trial after the same Manner, and therefore they also required twelve Compurgators.

IN Conformity to the Rules of the Canon Law we have also several Cases.

FIRST, if the Crime be manifest, it will admit of no Purgation, and therefore on Debt for Rent on a Lease for Years, the Defendant shall not wage his Law, for the Reason on which the Action arises is from the taking the Profits of the Estate in Lease, which is manifest in the Neighbourhood, and therefore the Defendant cannot swear as to the Payment of the Debt.

SECONDLY, another Rule is, that the Purgation must be made by honest Persons, and Men of unspotted Reputation, which is a Rule carried something further than the Canonists would carry their Rule in criminal Matters, for the Reputation of the Defendant might be blemished in a Criminal Prosecution, but in Civil Actions to which our Law confined this Manner of Trial they required also a fair Reputation in the Defendant, and therefore he was not admitted to wage his Law, who was attaint or outlawed in any Action that charged him with any Deceit or Injury, and therefore where a Man was impleaded

pleaded in an Action of Deceit or Trespass, the Defendant could not wage his Law.

Also in Case there can be no Law-wager, <sup>Vaugh. 101.</sup> because the Damages are uncertain, and a Man cannot make Oath of paying what he doth not know to be due, and that he ought to pay it.

Secondly, \* *Nil debet per Patriam.*

If a Man makes a Lease for Years either by Parol or Indenture, † *Nil Debet* is the general Issue; but in Debt upon an Obligation § *Non est Factum*, as is shewn, is the general Issue; and the Reason of the Difference is this; in Case of a Bond, the Debt arises on the owing of it by the Specialty, and therefore the Consequence is that you cannot disown it in the Issue, for then you would fall into this Absurdity, that you would deny the Debt, yet not deny the Deed which owns the Debt; now you cannot disown the Deed which confesses the Debt under your own Hand and Seal, without denying it to be your own Deed, which Issue is § *Non est Factum*, and without disowning the Deed you cannot disown the Debt which arises on the Deed only.

Cro. Jac. 127,

233.

Brownl. 105.

Bulst. 1.

Yelv. 167.

2 Brownl. 220.

BUT in Case of a Lease by Deed for Years the Demand arises not only on the Deed, but on the taking of the Profits in pursuance of that Contract, for there is no Debt

\* He owes nothing by his Country.

† He owes nothing.

§ It is not his Deed.

until the Day of Payment, and this doth not depend upon the Act of the Lessee only, as in the former Case the Debt depended upon the mere Act and Acknowledgment of the Obligor, but also in the Act of the Lessor in quitting the Premises, so that the Denying the Contract, by pleading \* *Non est Factum*, could not be a general Issue, because not commensurate with the Declaration, for it might be the Deed of the Lessee, and yet no Debt might arise to the Lessor, because it is not the Deed alone that is required to make a Debt in this Case; now since an Act in *Pais* as well as the Deed goes to the creating this Debt, by taking away the Act in *Pais* you destroy the Debt, and therefore shewing any Act that infers Impossibility of the Lessee's taking the Profits is a good Discharge of the Debt.

BUT though this Obligation is not meerly founded on the Contract, but on the taking of the Profits also, yet in some Cases I may charge my Lessee though he never take the Profits; and this is where I charge the Lessee on his Contract, and as a Taker of the Profits of my Estate and Freehold, and he cannot discharge himself from such a Demand but by shewing his own Act or Laches in Excuse, which the Rules of Law will never allow as a good Excuse; and then in such a Case he is Pernor of the Profits † *de Jure* though not § *de Facto*, so the Law looks upon him as my Tenant and as taking the Profits of my

\* *It is not his Deed.*    † *Of Right.*    § *In Fact.*



Estate, because he cannot sufficiently excuse himself when I charge him with it.

THEREFORE if I make a Lease and quit Possession, though the Lessee never enters, I may charge him in Debt for Rent; so if he enters and assigns the Premises to another.

Rol. Abr. 605.  
2 Sid. 240.  
2 Vent. 209.  
3 Mod. 325.  
Co. Lit. 54.  
5 Co. 77. a. b.

BUT if my Lessee enters and assigns the Premises, I can never charge him with Waste committed after Assignment, for though the Law Books own him as my Tenant \* *de jure* on his own Contract, which by his own Act cannot be dissolved, yet this is only to answer my Rent which by his Contract he had undertook to levy and pay me out of the Profits; but this Supposition of Law shall not make him answer for the wrongful Acts of another to whom he had a legal Power to assign it, and when the Penalty by the Words of the Statute is laid on the very Tenant, for the Supposition and Notions of the Law are framed to do every Body Right, but not to do any Man an Injury.

THE last Receipt is good Evidence that all before is paid, and the Lessee for Years was antiently reckoned in the Nature of a Receiver or Bailiff of the Freehold, and therefore upon any such Contracts he was chargeable as a Debtor to the Freeholder, upon taking the Profits of the Estate that in the Eye of the Law do belong to the Person whom the Law makes Tenant of the Free-

Tri. per Pais  
418.  
L. E. 196. pl. 13.

\* By Right.

hold;

hold; now no Body can be supposed to continue another in the Possession of the Estate, and to discharge him on the Receipt of the last Rent, if he had not received what was formerly due, no more than a Man would state Accounts with his Steward, and discharge him on the Accounts of this Year before he had received what was precedent; the very continuing in the same State, and a Man's behaving so well as to account for the Money due this Year, is a Presumption that he hath done the same Thing formerly, or else a Man would not now have suffered it; but if this Acquittance be under Hand and Seal, then it may be pleaded, and 'tis such Evidence as nothing can be proved to the contrary, for this is Evidence by Specialty, and any Deceit or Mistake in former Payments is but Matter in \**Pais*, and therefore not of as high a Nature as the Deed; and in giving Evidence every Thing must be contradicted by a Matter of the same Notoriety as that whereby it is proved.

Co. Lit. 373.  
Dy. 71. b.  
3 Co. 65.  
2 Sid. 44.

Mod. 118.

Mod. 35, 118.  
Vent. 358.  
2 Sid. 151.  
Lev. 104.  
2 Keb. 762.  
but 2 Leon. 10.  
Gouldsb. 80.  
and Ow. 55.  
contra.  
L. E. 196. pl. 9.

EVICTIO, Expulsion, and any Suspension of Rent, is good Evidence upon † *Nil Debet*, for that amounts to discharge and falsify in the Case of Complaint, for then there was no Pernancy of the Profits whereby I could become Debtor to him in Reversion, and so the Act in \**Pais* is discharged, which goes of Necessity to the creating of this Debt, though others have held it ought to be pleaded.

\* *Fals.*

† *He owes nothing.*

If the Lessor enter into Part, the whole Rent is suspended, for the Lessor cannot apportion it by a wrongful Act of his own; for if the Party himself by his own Wrong doth hinder himself from the Benefit of his own entire Contract, the Jury ought not to divide it in his Favour, for possibly the Lessee would not have contracted for one Part without the other.

1 Inst. 243. a.  
Vent. 277.  
Rol. Abr. 398.

If a Stranger evict the Lessee of Part of the Land, the Rent must be apportioned, for though Part be taken away, since also some Part remains, there is a Part of the Consideration Money remaining due to the Lessor, for otherwise the Act of the Law in the Stranger's Recovery would do Wrong to the Lessor.

If a Demise be pleaded, a Lease upon Condition is good Evidence to maintain the Declaration, because a Lease upon Condition is a Lease which maintains the Truth of the Declaration, \* *Quod cum J. S. dimisisset.*

Tri. per Pais  
363.

In Debt for Rent upon a Lease, and † *Nil Debet* pleaded, § *Ne unques seise de la Terre* may be given in Evidence; for if the Lessor doth keep Possession against the Lessee that he cannot enter, in as much as this Action arises, not on the Contract only, but on the Pernancy of the Profits in pursuance of that Contract, there is no Rent due, and conse-

2 Rol. Abr. 677.  
pl. 21.  
L. E. 196. pl. 22.

\* That whereas J. S. demised. † He owes nothing.  
§ Never seised of the Land.



quently this is an Evidence that that is no Debt at all, and therefore proves the Issue.

Rol. Abr. 605.

BUT if the Lessor waves the Possession, though the Lessee never enters, yet an Action of Debt lies for the Rent; for though the Lessee did not enter and take the Profits, yet since he might have entered and have taken them, he cannot make his own Fault and Laches any Part of his Defence.

2 Rol. Abr. 677.  
Tri. per pais  
412.

BUT on the Plea of \* *Riens arriere*, or Levy by Distress, † *Ne unque seise de la Terre* is no good Evidence, for when a Man insists that there is nothing behind of the Rent, or that it is already levied by Distress, it supposes that he has the Possession of that for which he has already paid the Rent, or for which the Rent is already levied.

2 Rol. Abr. 683.  
9 H. 7. 3. b.  
L. E. 192. pl. 1.

IN Debt for the Arrears of an Account, upon § *Nil Debet*, the Defendant may give in Evidence that there was no such Account as this, for if there were no such Account as this, there could be no Arrears of it, then the Defendant owes nothing to the Plaintiff.

Hil. AT. 1700.

DEBT for Rent on a Lease, the Evidence to prove the Lease was, that the Plaintiff leased the House to the Defendant at a Rent but no Time mentioned, and it was agreed at the same Time that the Lessee was not to leave it without half a Year's Warning, for when the Rent is payable half yearly, and

\* *Nothing in Arrear.* † *Never seised of the Land.*  
§ *He owes nothing.*

the Lessor permits him to continue any Part of the half Year, 'tis an Indication of his Will that he should continue the whole half Year, and the like Law as to a Quarter's Notice of the Rent payable quarterly.

WHERE a Man shews Payment, he falsifies the Declaration, which is proper upon the general Issue; but where he shews a Release, he confesses and avoids the Debt, he admits the Contract and the Pernancy of the Profits in pursuance of the Agreement, but insists on a Counter-agreement.

UPON \**Nil Debet* pleaded it was doubtful whether a Defendant might give in Evidence that his Lessor was bound by Covenant to repair the Houses, and that he expended the Rent in necessary Reparations; two Judges against one held that this was a good Discharge of the Tenant, because 'tis very convenient that the Law should look upon this as a Payment, and not put the Lessee to sue his Covenant, for the House might tumble down before the Tenant could have the Effect of his Suit; but the Judges differ'd in this, whether the Recovery for Reparations ought to be pleaded, or might be given in Evidence, though the latter seems plainly to be the best Opinion, because as it is a Discharge it amounts to Payment, and then it is very good Evidence on \**Nil Debet*, for if the Rent be paid it is no Debt; also if it must be pleaded, it is the Plea of a collateral

Cro. Eliz. 227.  
12 H. 8. 6.  
See Tri. per Pais  
415, &c.  
L. E. 196. pl. 14.

\* *He owes nothing.*

Agree-

Agreement in Satisfaction of the Debt, and then no such Agreement can be proved, for though there was an Agreement that the Lessor should repair, yet there was no Agreement that the Lessee should expend his Rent on such Reparations.

Cro. El. 222.

L. E. 196. pl. 14.

UPON \* *Nil Debet*, Payment is good Evidence to discharge the Debt, for the Issue is in the present Tense, whether there be a Debt or not at that Instant when the Issue was taken, and there is no Debt where it is paid.

Tri. per Pais

420.

22 H. 2. 1.

BUT ON \* *Nil Debet* a Release cannot be given in Evidence, for though a Debt when it is released is no more than when it was paid, yet when it is discharged by Release under Hand and Seal, it must be pleaded and shewn to the Court, that it may appear to the Court to be discharged with those apt Words and Solemnities that the Law requires to make a legal Contract, for verbal Contracts in such Cases are not sufficient, because they are † *nuda pacta* which create no Obligation.

Mod. 116.

3 Keb. 305.

IN an Action of Escape, and \* *Nil Debet* pleaded, fresh Pursuit may be given in Evidence, for by Proof of the fresh Pursuit he falsifies the Declaration, for 'tis plain he doth not let him go at large by his Permission, and the very Gift of the Declaration is § *Quod permisit le Prisoner ire ad largum*.

\* He owes nothing.  
 Prisoner to go at large.

† Void Agreements.

§ That he suffered the

ON



ON \* *Nil Debet*, the Retainer of the same Sum by verbal Agreement was given in Evidence, and allowed to be good, for this amounts to a Payment, and when the Lease is by Deed, it cannot be pleaded without Deed.

ALSO since such Expence in Reparation must be pleaded as a Counter-Agreement in Satisfaction of the Debt, if the Lease be by Deed, they must plead this Counter-Agreement by Deed, else † *Non solvitur eo Ligamine quo ligatur*. Gouldf. 80.  
Rol. Abr. 605.

Lastly, The Plea amounts to the General Issue.

BUT it may be objected, that since two Debts of equal Value in two several Persons are not Satisfaction to each other without Agreement, which must be pleaded, why should there be any Recouper or Ballance of Demands in this Case? Objection.

IT is true the two Debts of equal Value are no Satisfaction to each other, and the Reason is because nothing can come in Proof but the Truth of the Matter alledged §. Answer.  
Anonymous.

WHEN one Debt is alledged in the Declaration, you shall not encounter it with the Proof of another to which no Man can come prepared; for if one Debt were to ballance another in this Manner, all the Transactions during the Parties whole Lives must be run

\* He owes nothing. † It is not discharged by the same Means it was contracted. § By 3 Geo. 2. c. 22. sect. 13, made perpetual by 8 Geo. 2. c. 24. sect. 4. mutual Debts may be set off one against the other.

over in every single Action, which would make Suits perfectly infinite; but it is not unreasonable to ballance Demands arising on the same Contract and in the same Action; for the Law, to avoid Circuity of Actions, considers the whole Matter of the same Demand, and doth not take it in Part to break it into several Actions, for that is contrary to the Office of a Judge, which is to determine and not to multiply Controversies, and therefore if a Disseisor disburfes Money in Repairs to have a Rent Charge issuing out of the Land, it shall be recovered in Damage, for the Law ballances the Damages in View of the whole Matter, and not on a partial Consideration of the Damage merely belonging to the Disseisin, for that would create another Action, and so in this Case the Law considers the Money expended in Repairs as paid to the Lessor.

Raym. 487.  
 Danv. Abr. 610.  
 pl. 10.  
 2 Jones 217;  
 232.  
 2 Show. 233.

WHERE a Matter may be intended different Ways on the Allegation, so as to make or not make a Right in the Plaintiff, such Allegation is not good; but if it is necessary that the Evidence should settle the Doubt, there the Matter shall be intended for the Plaintiff, if found for him; as if in Debt for Rent the Plaintiff sets forth that *A.* was possessed of Lands for ninety-nine Years, who demised the Premises to the Defendant for twenty-one Years, and then *A.* granted the Reversion to the Plaintiff, and so for Rent in Arrear he brought his Action; now this upon the Allegation may be intended an ineffectual or inefficacious Grant of the Reversion,

sion, because he has shewn no Attornment; yet if the Defendant pleads \* *Nil Debet*, if it be found for the Plaintiff, there what was before doubtful on the Words of the Declaration must be ascertained, for if there was no effectual Grant proved, there could be no Debt to the Plaintiff; an effectual Grant must be supposed to be proved, otherwise there could be no Debt, and so the Word † *Concessit*, that before stood indifferent, must be intended a Grant made effectual by Attornment, and not an ineffectual or inefficacious Grant, for the Jury must not be intended to give a false Verdict, and such Construction can never be made of the Allegation as cannot be made without falsifying the Verdict.

IN Debt for not setting out of Tithes,  
\* *Nil Debet* is the General Issue to bring the Matter in Question.

\* *He owes nothing.*

† *Granted.*



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